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Limiting A Driver's Limited Right To Counsel In DWI Proceedings: State v. Rosenbush, 931 N.W.2d 91 (Minn. 2019)

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**LIMITING A DRIVER'S LIMITED RIGHT TO COUNSEL IN
DWI PROCEEDINGS: STATE V. ROSENBUSH, 931 N.W.2D
91 (MINN. 2019)**

Lisa Perunovich

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I. INTRODUCTION

In 2017, the Minnesota Legislature enacted statute section 171.177, which required blood and urine tests to determine blood alcohol concentrations be supported by a valid search warrant.¹ Under this statute, drivers subjected to a warranted chemical test may lawfully refuse to submit fluid samples and thwart the administration of the chemical test. Thus, drivers suspected of DWI must decide whether they will comply with the search warrant and submit a fluid sample that may adversely affect their interests in subsequent criminal proceedings or, alternatively, exercise the lawful option of refusal. Despite this critical and binding decision, in *State v. Rosenbush*, the Minnesota Supreme Court refused to extend Minnesota's Constitutional limited right to counsel to warranted chemical tests.² The

¹ 2017 Minn. Laws, ch. 83, art. 2, § 10 (effective July 1, 2017); MINN. STAT. 171.177 (2019).

² 931 N.W.2d 91 (Minn. 2019).

Court's decision rendered irrelevant, in effect, its previous holding in *Friedman v. Commissioner of Public Safety*³ recognizing a state constitutional limited right to counsel before deciding whether to submit to chemical testing pursuant to Minnesota's implied consent law.⁴

This note first reviews the history of implied consent laws, with a particular focus on Minnesota's implied consent law.⁵ Next, it reviews the history and objectives behind the protection of the right to counsel under both the United States' and Minnesota's Constitutions.⁶ It then provides a synopsis of *State v. Rosenbush*⁷ by considering the holding and reasoning employed by the Minnesota Court of Appeals,⁸ the Minnesota Supreme Court,⁹ and the Minnesota Supreme Court's dissenting opinion.¹⁰ Lastly, it concludes that the statute at issue in *Rosenbush* is flawed and explores how the Minnesota Supreme Court's reasoning fails to adequately support its holding.¹¹

This note suggests that the reasoning behind the Minnesota Supreme Court's decision in *State v. Rosenbush* is inconsistent with precedent. *Rosenbush* frustrates the general principles of the limited right to counsel recognized in *Friedman* by denying a driver suspected of DWI access to counsel prior to the deciding whether he or she will submit to the warranted blood or urine test. Additionally, this note suggests that Minnesota Statute section 171.177 is generally inconsistent with the search warrant requirement insofar as it affords drivers the legal option to decline a warranted test. These inconsistencies produce a new, unique decision presented to drivers and create additional problems with regards to Minnesota's limited right to counsel.

³ 473 N.W.2d 828 (Minn. 1991).

⁴ *Id.* at 835. In *Friedman*, the court recognized a "limited" right to counsel because the "exercise of this right cannot 'unreasonably delay the administration of the test.'" *Rosenbush*, 931 N.W.2d at 96 n.4 (quoting *Prideaux v. State*, 310 Minn. 405, 421, 247 N.W.2d 385, 394 (1976)).

⁵ See *infra* Part II(a).

⁶ See *infra* Part II(b).

⁷ 931 N.W.2d 91 (Minn. 2019).

⁸ See *infra* Part III(b).

⁹ See *infra* Part III(c).

¹⁰ See *infra* Part III.

¹¹ See *infra* Part IV.

II. HISTORY

A. *Minnesota's Implied Consent Law*

In 1911, the Minnesota Legislature first recognized the dangers of drunk driving and made “driving while in an intoxicated condition” (“DWI”) a misdemeanor.¹² At that time, law enforcement’s only tool for determining whether a driver was under the influence of alcohol was his own observations, similar to today’s field sobriety tests.¹³ In 1954, the Breathalyzer was developed, which allowed law enforcement to estimate a driver’s blood alcohol concentration using chemical oxidation and photometry to measure alcohol vapors in a person’s breath.¹⁴ Until the late 1960s, most American courts were lenient with DWI prosecutions and generally would not prosecute a driver for DWI unless his or her blood alcohol concentration was above 0.15.¹⁵

¹² OFFICE OF TRAFFIC SAFETY, MINN. DEP’T OF PUB. SAFETY, MINNESOTA IMPAIRED DRIVING FACTS, 50 (2017). Today, a person’s first DWI offense with a BAC under 0.18 constitutes a misdemeanor. A person’s first DWI offense with a BAC over 0.18 is punished as a gross misdemeanor. Four or more DWI offenses constitutes a felony. *See id.* at 60, 63.

¹³ *History of the Breathalyzer*, GUARDIAN INTERLOCK (Dec. 16, 2014), <https://guardianinterlock.com/blog/history-breathalyzer/> [<https://perma.cc/J7ZH-4YYG>] (officers looked for bloodshot eyes, the smell of alcohol, and whether the driver could walk in a straight line or touch his or her nose—much like today’s field sobriety tests).

¹⁴ Douglas Martin, *Robert F. Borkenstein, 89, Inventor of the Breathalyzer*, N.Y. TIMES (Aug. 17, 2002) <https://www.nytimes.com/2002/08/17/us/robert-f-borkenstein-89-inventor-of-the-breathalyzer.html> [<https://perma.cc/JC6S-E74C>]; *see also* Wayne A. Morris, *A New Look at Breath Alcohol Testing*, 33 CHAMPION 44 (2009).

¹⁵ *See* Robert B. Voas, Tara Kelley-Baker, Eduardo Romano & Radha Vishnuvajjala, *Implied-Consent Laws: A Review of the Literature and Examination of Current Problems and Related Statutes*, 40 J SAFETY RES. 1, 2 (2009); Matt Novak, *Drunk Driving and the Pre-History of Breathalyzers*, GIZMODO (Dec. 31, 2013), <https://paleofuture.gizmodo.com/drunk-driving-and-the-pre-history-of-breathalyzers-1474504117> [<https://perma.cc/7KAJ-2N2M>]. Most legislatures implemented blood alcohol concentration standards based on guidelines determined by a 1938 study by the National Safety Council and the American Medical Association. *Id.* A special committee of the American Medical Association (Committee to Study Problems of Motor Vehicle Accidents) established the following chemical standards for the legal interpretation of ‘under the influence of alcohol’:

Below 0.05 percent alcohol in the blood: no influence of alcohol within the meaning of the law.

Between 0.05 and 0.15 percent, a liberal, wide zone: alcoholic influence usually is present, but courts of law are advised to consider the behavior of the individual and circumstances leading to the arrest in making their decision.

0.15 percent: definite evidence of under the influence, since every individual with this concentration would have lost a measurable extent some of the clearness of intellect and control of himself that he would normally.

Starting in 1968, Americans began to understand the dangers of drunk driving. A study conducted by the U.S. Department of Transportation found that almost half of the nation's automobile fatalities involved alcohol.¹⁶ However, the real change occurred in 1980 with the emergence of social activists groups.¹⁷ Following the killing of her 13-year-old daughter by a drunk driver, Candy Lightner founded Mothers Against Drunk Driving ("MADD").¹⁸ MADD's mission was to advocate for stricter DWI laws and to stigmatize drunk driving.¹⁹ Eventually, American society began vilifying drunk drivers.²⁰

Compelled by the social interest to protect Americans against drunk drivers, lawmakers strengthened drinking and driving laws.²¹ In an effort to control the persistent concern of drunk driving, all fifty states today have enacted implied consent statutes based on the principle that driving is a privilege and not a right.²² These laws specify that persons operating a motor vehicle agree to submit to chemical tests of breath, blood, or urine to determine alcohol or drug content.²³ These statutes are utilized to serve the legitimate public policy of convicting drunk drivers, but the constitutionality of these statutes has been challenged.²⁴

NAT'L. SAFETY COUNCIL, A HISTORY OF THE COMMITTEE ON ALCOHOL AND OTHER DRUGS 8 (2004), https://www.nsc.org/Portals/0/Documents/NSCDocuments_Advocacy/NSChistoryofCAOD.pdf [<https://perma.cc/XV64-ZNDW>] (formatting modified from the original).

¹⁶ U.S. DEPT. OF TRANSP., 90TH CONG., 1968 ALCOHOL AND HIGHWAY SAFETY REPORT 1 (COMM. PRINT 1968).

¹⁷ Voas, Kelley-Baker, Romano & Vishnuvajjala, *supra* note 15, at 3.

¹⁸ *First Drunk Driving Arrest*, HISTORY (Nov. 24, 2009), <https://www.history.com/this-day-in-history/first-drunk-driving-arrest> [<https://perma.cc/93C9-BAFM>].

¹⁹ *See id.*

²⁰ Adam K. Raymond, *A Brief History of Drunk Driving*, THE FIX (Nov. 23, 2011), <https://www.thefix.com/content/brief-history-drunk-driving-dui-laws-thanksgiving7007> [<https://perma.cc/K8YJ-6A87>].

²¹ *See* Kelsey P. Black, *Undue Protection Versus Undue Punishment: Examining the Drinking and Driving Problem Across the United States*, 40 SUFFOLK U. L. REV. 463, 465 (2007).

²² Cheryl F. Hiemstra, *Keeping DUI Implied Consent Laws Implied*, 48 WILLAMETTE L. REV. 521, 523–24, n.7, 534 (2012); Voas, Kelley-Baker, Romano & Vishnuvajjala, *supra* note 15, at 3.

²³ Tina Wescott Cafaro, *Fixing the Fatal Flaws in OUI Implied Consent Laws*, 34 J. LEGIS. 99, 102 (2008) ("An implied consent statute's 'central feature is that any person who drives on the public highways is deemed to have consented to a chemical test to determine the alcohol or drug content of the person's blood.'") (citing *Hinnah v. Dir. of Revenue*, 77 S.W.3d 616, 619 (Mo. 2002)).

²⁴ *See, e.g., Birchfield v. State*, 136 S. Ct. 2160 (2016); *People v. Gaede*, 20 N.E.3d 1266 (Ill. App. Ct. 2014); *Schutt v. MacDuff*, 127 N.Y.S.2d 116 (N.Y. Sup. Ct. 1954).

1. *Evolution of Implied Consent Laws in Minnesota*

In 1961, Minnesota enacted its first civil implied consent law.²⁵ Pursuant to this law, any person driving a vehicle in Minnesota impliedly consents to a blood alcohol concentration test if the requesting officer has probable cause to suspect impairment.²⁶ At that time, chemical testing refusal was subject to automatic license revocation for a period of six months.²⁷ The first case to recognize the application of the right to counsel when a driver is requested to undergo blood alcohol concentration testing was *Prideaux v. Department of Public Safety*.²⁸

The Minnesota Legislature amended the implied consent law in 1978, following the Minnesota Supreme Court's decision in *Prideaux*, which afforded drivers a statutory right to consult with counsel before submitting to chemical testing.²⁹ The amendments developed the Implied Consent Advisory by obliging law enforcement to inform suspected drivers that they have a limited right to consult with counsel before deciding whether to submit to the chemical test, so long as it does not "unreasonably delay administration of the test."³⁰ Simultaneously, the Impaired Driving code was amended to provide that "medical or chemical analysis" results determining the "amount of alcohol or a controlled substance in the person's blood, breath, or urine" were only admissible as evidence in criminal DWI prosecutions if the tests were "taken voluntarily or pursuant to § 169.123."³¹ Thus, chemical test results could only be used against a driver accused of DWI if the driver consented to the test or if law enforcement complied with

²⁵ State v. Capelle, 172 N.W.2d 556, 558 (Minn. 1969) ("L. 1961, c. 454, established the so-called 'implied consent' law, codified as § 169.123. . . . [the implied consent statute establishes] the driver of a vehicle is given an option of consenting to a blood, urine, or breath test, or having his driver's license revoked for 6 months."); OFFICE OF TRAFFIC SAFETY, *supra* note 12, at 3.

²⁶ OFFICE OF TRAFFIC SAFETY, *supra* note 12, at 3.

²⁷ FORST LOWERY, MINN. DEP'T OF PUB. SAFETY, DOT HS-806-549, MINNESOTA'S DOUBLE BARRELLED IMPLIED CONSENT LAW 27 (Dec. 1983).

²⁸ 310 Minn. 405, 418, 247 N.W.2d 385, 393 (1976).

²⁹ *Id.* at 391 (holding that drivers suspected of DWI have a statutory right to counsel before deciding whether to submit to chemical testing pursuant to the implied consent law); Nyflot v. Comm'r of Pub. Safety, 369 N.W.2d 512, 515 (Minn. 1985) ("In 1978, the legislature signified its agreement with *Prideaux* by expanding the implied consent advisory."). The previous Implied Consent Advisory only informed drivers that refusal to submit to chemical testing would result in automatic license revocation and after submitting to the chemical test, the driver could request additional tests administered by a person of his or her choosing. MINN. STAT. § 169.123 (1976) (repealed 2000).

³⁰ 1978 Minn. Laws, ch. 727, subdiv. 2(b)(3).

³¹ MINN. STAT. 169.121, subdiv.1(a) (repealed 2000).

the procedures set out in the applicable implied consent statute, which required drivers be informed of their right to consult with an attorney.³²

In 1984, legislative changes were made to the advisory to deny the right to counsel prior to testing.³³ The modified advisory informed suspected drivers that they are required to submit to the chemical testing pursuant to Minnesota law and failure to do so would result in license revocation for one year.³⁴ Because it no longer afforded drivers a limited right to counsel prior to testing, drivers were informed they have a right to counsel only after deciding whether to submit to the chemical test.³⁵ Thus, the legislative changes to the implied consent law effectively eliminated the previously recognized statutory right to counsel. Confirmed by the Minnesota Supreme Court's holding in *Nyflot v. Commissioner of Public Safety*, Minnesota law no longer afforded drivers suspected of DWI the statutory right to counsel prior to deciding whether to submit to chemical testing.³⁶

This changed once again in 1991 when the Minnesota Supreme Court determined that the implied consent statute violates Article 1 section 6 of the Minnesota Constitution because it denies a person of their state constitutional limited right to counsel.³⁷ In response to the court's decision, the Minnesota Legislature tailored the Implied Consent Advisory to comply with the Minnesota Constitution. In doing so, the new advisory required law enforcement officers to inform drivers "[a]t the time testing is requested . . . that the person has the right to consult with an attorney" before deciding

³² In 1984, the Legislature removed the limiting language from the Impaired Driving Code and no longer relied on voluntary consent or the implied consent statute. Minnesota Statute section 169A.45, subdivision 1 provides: "[u]pon the trial of any prosecution arising out of the acts alleged to have been committed by any person arrested for violating section 169A.20 [(driving while impaired)] . . . the court may admit evidence of the presence or amount of alcohol in the person's blood, breath, or urine as shown by an analysis of those items." MINN. STAT. §169A.45, subdiv. 1 (2019).

³³ Act of May 2, 1984, ch. 622, § 10, 1984 Minn. Laws 1336 (repealed 1993).

³⁴ Act of May 2, 1984, ch. 622, § 12, 1984 Minn. Laws 1541, 1546-47 (repealed 1993). The civil consequence of license revocation for refusal was increased from six months to one year. *Id.*

³⁵ *Id.*

³⁶ *Nyflot v. Comm'r of Pub. Safety*, 369 N.W.2d 512, 515 (Minn. 1985). The Minnesota Supreme Court concluded that the legislative changes made to the implied consent statute demonstrate its intention to remove the limited right to counsel afforded to drivers. *Id.* at 515; see *infra* Section II(b)(ii)(3).

³⁷ *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 833 (Minn. 1991).

whether to submit to the test.³⁸ In 2001, the implied consent law was recodified as Minnesota Statute sections 169A.50-169A.53.³⁹

2. *Minnesota's Modern Implied Consent Law*

Collectively, Minnesota Statutes sections 169A.50 to 169A.53 are referred to as Minnesota's "Implied Consent Law."⁴⁰ The modern implied consent Statute in Minnesota states:

Any person who drivers, operates, or is in physical control of a motor vehicle within this state or on any boundary of water of this state consents, subject to the provisions of sections 169A.50 to 169A.53 (implied consent law), and section 169A.20 (driving while impaired), to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol, a controlled substance or its metabolite, or an intoxicating substance.⁴¹

In order for a blood, breath, or urine test to be administered, the implied consent statute, in relevant part, requires that it be at the direction of a police officer who "has probable cause to believe the person was driving, operating, or in physical control of a motor vehicle in violation of section 169A.20 (driving while impaired)."⁴² Before the administration of a breath test, Minnesota law requires that drivers be informed that they are required by law to take the test, that failure to submit to the test is a crime, and that they have a limited right to consult with an attorney.⁴³ Although warrantless breath tests are permissible, blood and urine tests can only be conducted pursuant to a search warrant or a judicially recognized exception to the search warrant requirement.⁴⁴

In response to Minnesota and U.S. Supreme Court rulings, the legislature enacted Minnesota Statute section 171.177 (license revocation), which requires blood and urine tests to be conducted in compliance with specified procedures.⁴⁵ The chemical test advisory, pursuant to Minnesota

³⁸ 1993 Minn. Laws, ch. 347, § 10 (codified at MINN. STAT. § 169.123, subd. 2(b) (Supp. 1993)) (repealed 2000).

³⁹ 2000 Minn. Laws, ch. 478, § 7.

⁴⁰ MINN. STAT. § 169A.50 (2019).

⁴¹ MINN. STAT. § 169A.51, subd. 1 (2019).

⁴² *Id.*

⁴³ *Id.* at subd. 2.

⁴⁴ *Id.* at subd. 3. The breath test advisory informs a driver that they are required to take the test pursuant to Minnesota law, refusal to submit to the test is a crime, and they have the limited right to counsel. *Id.* at subd. 2.

⁴⁵ *Id.* at subd. 3; State v. Rosenbush, 931 N.W.2d 91, 96 (Minn. 2019) ("But in 2017, the Legislature amended the implied-consent statutes after several judicial decisions limited the

Statute section 171.177, only informs drivers that “refusal to submit to a blood or urine test is a crime.”⁴⁶ Despite the nature of implied consent, the statute further provides that “[i]f a person refuses to permit a [warranted] blood or urine test . . . then a test must not be given.”⁴⁷ Although law enforcement may initially decide whether to administer a blood or urine test, the suspected driver must be offered both a blood and urine test and subsequently refuse both before the refusal amounts to an actionable offense.⁴⁸

3. *Traffic Stops and Implied Consent Testing Procedures*

The United States and the Minnesota Constitution prohibit unreasonable searches and seizures by the government.⁴⁹ Although a traffic stop constitutes a “seizure” within the meaning of the Fourth Amendment of the Constitution and Article 1 section 10 of Minnesota’s Constitution, traffic stops are considered investigative seizures and require lesser justifications than custodial seizures.⁵⁰ In Minnesota, police may conduct a limited investigative seizure without a warrant, so long as they have an objective particularized articulable suspicion of criminal activity to justify the traffic stop.⁵¹ Although the standard for justification of traffic stops is relatively lenient, the basis of the stop must be established on more than “mere whim, caprice, or idle curiosity.”⁵² In determining whether the factual

ability of police to obtain warrantless blood and urine samples from suspected impaired drivers.”).

⁴⁶ MINN. STAT. § 171.177, subdiv. 1 (2019).

⁴⁷ *Id.* at subdiv. 13; *see also* MINN. STAT. § 169A.52, subdiv. 1.

⁴⁸ MINN. STAT. § 171.177, subdiv. 2 (2019).

⁴⁹ The Fourth Amendment of the United States Constitution provides: “The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” *See also* MINN. CONST. art. I, §10.

⁵⁰ U.S. CONST. amend. IV; MINN. CONST. art. I, §10. *Contra* Terry v. Ohio, 392 U.S. 1, 30 (1968) (distinguishing an arrest from a limited and investigative search, and applying the “reasonable articulable suspicion” standard to the latter); Adams v. Williams, 407 U.S. 143 (1972) (applying the “reasonable articulable suspicion” to motor vehicle stops).

⁵¹ Terry, 392 U.S. at 21–22; State v. Richardson, 622 N.W.2d 823, 825 (Minn. 2001) (when determining whether reasonable suspicion exists “consider the totality of the circumstances and acknowledge that trained law enforcement officers are permitted to make inferences and deductions that would be beyond the competence of an untrained person.”).

⁵² Ascher v. Comm’r of Pub. Safety, 519 N.W.2d 183, 187 (Minn. 1994); *see also* Alabama v. White, 496 U.S. 325, 330 (1990) (recognizing that the factual basis required to justify an investigative seizure is “obviously less demanding . . . than probable cause.”); State v. Cripps, 533 N.W.2d 388, 391 (Minn. 1995); State v. Harris, 590 N.W.2d 90, 101 (Minn. 1999) (“A

basis sufficiently justifies a traffic stop, courts apply the totality of circumstances test and may consider the “officer’s experience, general knowledge, and observations; background information, including the nature of the offense suspected and the time and location of the seizure; and anything else that is relevant.”⁵³ Further, during a traffic stop each additional intrusion “must be strictly tied to and justified by the circumstances which rendered the initiation of the stop permissible.”⁵⁴ As a guide, the following is an overview of the procedural requirements for impairment testing under the implied consent law.

For a police officer to conduct a lawful traffic stop, he or she must first have an objective particularized articulable suspicion of some type of criminal activity. Even minor traffic violations justify investigative traffic stops, such as speeding, changing lanes without using turn signals, and swerving.⁵⁵ If an officer becomes aware of such conduct, it is likely he or she has reasonable suspicion to justify the traffic stop. However, the Minnesota Constitution requires that any additional intrusions not closely related to the initial justification for the traffic stop be unlawful unless there is independent probable cause or reasonableness to justify the subsequent intrusion.⁵⁶

The administration of field sobriety tests and preliminary breath tests is an expansion of a traffic stop and must be supported by reasonable suspicion of DWI.⁵⁷ Therefore, if blood alcohol concentration (“BAC”) testing is not closely related to the additional stop, the officer must have probable cause or reasonable suspicion of DWI before he may lawfully initiate impairment testing.⁵⁸ “An officer needs only one objective indication of intoxication to constitute probable cause to believe that a person is under

hunch, without additional objectively articulable facts, cannot provide the basis for an investigatory stop.”).

⁵³ Applegate v. Comm’r of Pub. Safety, 402 N.W.2d 106, 108 (Minn. 1987).

⁵⁴ State v. Askerooth, 681 N.W.2d 353, 364 (Minn. 2004); *see also* State v. Creviston-Lerud, No. A18-0843, 2019 WL 1233551, at *2 (Minn. Ct. App. Mar. 18, 2019) (“The extension of a traffic stop does not violate the Minnesota Constitution ‘so long as each incremental intrusion during the stop is tied to and justified by one of the following: (1) the original legitimate purpose of the stop, (2) independent probable cause, or (3) reasonableness, as defined in *Terry v. Ohio*.’”) (citation omitted)).

⁵⁵ State v. George, 557 N.W.2d 575, 578 (Minn. 1997) (“Ordinarily, if an officer observes a violation of a traffic law, however insignificant, the officer has an objective basis for stopping the vehicle.”); State v. Jones, 649 N.W.2d 481, 484 (Minn. Ct. App. 2002) (upholding traffic stop where police observed driver changing lanes without signaling).

⁵⁶ MINN. CONST. art. 1, § 10.

⁵⁷ Vondrachek v. Comm’r of Pub. Safety, 906 N.W.2d, 262, 268–69 (Minn. Ct. App. 2017).

⁵⁸ State v. Kier, 678 N.W.2d 672, 678 (Minn. Ct. App. 2004) *cert. denied* (Minn. June 15, 2004).

the influence,” which may include “an odor of alcohol, bloodshot and watery eyes, slurred speech, and an uncooperative attitude.”⁵⁹

An officer whose intrusions are justified by reasonable suspicion and probable cause may then request a preliminary breath test without obtaining a warrant, but must first inform a driver that failure to submit to the breath test is a crime and that he or she has a limited right to consult with counsel before deciding whether to submit to the breath test. On the other hand, an officer must obtain a search warrant for a driver’s blood and/or urine before he or she can request a driver to submit fluid samples for chemical testing purposes. Once the search warrant is obtained, the officer must read the driver the fluid-test advisory to inform the driver that failure to submit to the warranted-test is a crime.⁶⁰ At that moment, the driver is faced with a decision—either comply with the search warrant and submit fluid samples, or refuse to do so and suffer the criminal and civil consequences attached to refusal. A driver who refuses to submit to the chemical test suffers the legal ramifications of failure to submit and may not know that those consequences can be more severe than the penalties attached to a DWI conviction. Conversely, a driver may not know they have the legal option to refuse to submit and halt administration of the chemical test. Thus, the driver might submit to the test, fail, and have the results used as evidence against him or her in subsequent criminal proceedings.

Prior to the Minnesota Supreme Court’s decision in *State v. Rosenbush* and the 2017 legislative amendments, drivers were able to make well-informed decisions because they had the right to consult counsel before deciding whether to submit. After the Court’s decision, drivers no longer have the right to counsel until after deciding, which is arguably too late because the driver’s decision is binding at that point. The right to counsel is meant to attach at the point an accused needs the assistance of counsel.⁶¹

B. The Right to Counsel

1. United States Constitutional Right

The Sixth Amendment of the United States Constitution provides that: “in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”⁶² The central purpose of the

⁵⁹ *Id.*

⁶⁰ Language has been added and eliminated by the legislature throughout the years. *See infra* Part II.

⁶¹ *See infra* Part 2(b)(ii).

⁶² U.S. CONST. amend. VI. The right to counsel embodied in the Sixth Amendment originated from colonial statutes and constitutional provisions deliberately rejecting the

Sixth Amendment guarantee of counsel was to assure that the accused, when “confronted with both the intricacies of the law and the advocacy of the . . . prosecutor,” would be given assistance.⁶³ Indispensable to the fair administration of our adversarial system, the right to counsel is at the core of constitutional criminal procedure.⁶⁴ As Justice Sutherland explained:

The right to be heard would be in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.⁶⁵

There are two central reasons for the existence of a right to counsel. First, the layman requires protection from the complexities of the legal system.⁶⁶ A defendant may be uninformed concerning the legal rights granted to him. Thus, he requires the “guidance of one who is trained in the law to guard against the involuntary waiver of such rights.”⁶⁷ Additionally, even a defendant who understands his legal rights may “become so hopelessly confused in following the different paths of the law that he may unintentionally lose the advantages that our accusatorial system of law affords him.”⁶⁸ It is important to recognize that the foundation of the Sixth Amendment right to counsel is grounded in a lawyer’s professional role as

English common-law rule, which “severely limited the right of a person accused of a felony to consult with counsel at trial.” *See* *United States v. Ash*, 413 U.S. 300, 306 (1973) (citing *Powell v. Alabama*, 287 U.S. 45, 60 (1932)).

⁶³ *Ash*, 413 U.S. at 309.

⁶⁴ Akhil R. Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 641 (1996) (“The Sixth Amendment is the heartland of constitutional criminal procedure.”); *Maine v. Moulton*, 474 U.S. 159, 169 (1985) (“[T]he right to counsel safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding.”); *Ash*, 413 U.S. at 307–8 (The Sixth Amendment has been interpreted “to assure that the ‘guiding hand of counsel’ is available to those in need of its assistance.”) (citing *Gideon v. Wainwright*, 372 U.S. 335, 344–345 (1963) and *Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972)).

⁶⁵ *Powell v. State of Ala.*, 287 U.S. 45, 68–69 (1932).

⁶⁶ *United States v. Henry*, 447 U.S. 264, 292 (1980) (“[T]he concerns underlying the Sixth Amendment right to counsel are to provide aid to the layman in arguing the law and in coping with intricate legal procedures”); Felix Rackow, *The Right to Counsel -- Time for Recognition Under the Due Process Clause*, 10 CASE W. RES. L. REV. 216, 226 (1959) (“[T]he layman needs protection from the complexities of the legal system under which he lives.”).

⁶⁷ Rackow, *supra* note 66, at 226.

⁶⁸ *Id.*

a legal expert and strategist.⁶⁹ Second, the accused layman needs protection from fervent prosecutors.⁷⁰ The right to counsel acts as “a shield by which an accused defendant is protected from a vengeful public or overzealous police, prosecutors, or judges.”⁷¹ Thus, the core purpose of the Sixth Amendment right to trial is ensure fairness in the adversarial system by providing assistance to the accused confronted with the intricacies of law and minimizing the public prosecutor’s substantial advantages.

Although originally enforceable only in federal courts, the Supreme Court recognized the fundamental significance of the right to counsel in 1963 and made it binding on the states through the Due Process Clause of the Fourteenth Amendment.⁷² At first, the Court broadly defined “critical stage” as the point at which the accused requires counsel’s presence and guidance in order to secure later trial rights.⁷³ The Court later clarified the application of the right to counsel and held that it applies once a “critical stage”⁷⁴ in the criminal process is reached through the “initiation of judicial

⁶⁹ *Henry*, 447 U.S. at 293 (“[T]he theoretical foundation of the Sixth Amendment right to counsel is based on the traditional role of an attorney as a legal expert and strategist.”).

⁷⁰ *Williams v. Kaiser*, 323 U.S. 471, 476 (1945) (“A layman is usually no match for the skilled prosecutor whom he confronts in the court room. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law’s complexity, or of his own ignorance or bewilderment.”); F. Heller, *The Sixth Amendment*, 61 YALE L.J. 286 (1951) (“[T]he accused in the colonies faced a government official whose specific function it was to prosecute, and who was incomparably more familiar than the accused with the problems of procedure, the idiosyncrasies of juries, and, last, but not least, the personnel of the court.”).

⁷¹ Damon J. Keith, *Civil Liberties and Criminal Law: Balancing the Rights of the Accused with Rights of Society*, WASH. POST (Nov. 10, 1977), <https://www.washingtonpost.com/archive/local/1977/11/10/civil-liberties-and-criminal-law-balancing-the-rights-of-the-accused-with-rights-of-society/9927e31d-7d8a-4790-af1d-4e08527875d7/> [https://perma.cc/8FRR-W5S5]; Neil W. Schilke, *Right to Counsel – An Unrecognized Right*, 2 WM. & MARY L. REV. 318, 338–39 (1960) (“Without making any claim to generalization, it may be stated as common knowledge that the prosecuting technique in the United States is purported so as to regard a conviction as a personal victory calculated to enhance the prestige of the prosecutor. . . . This often serves to induce the prosecutor, who will later campaign on his conviction record, to unquestioningly assume guilt and unrelentingly prosecute the person accused. . . . Prosecutors have justified many illegal practices by the “deluded dogma that the end will sanctify the means.”).

⁷² See generally *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (describing the right to counsel as fundamental and essential).

⁷³ *Gerstein v. Pugh*, 420 U.S. 103, 122 (1975) (describing a critical stage as any stage at which “potential substantial prejudice to defendant’s rights inheres” including “pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel.”); see also *United States v. Wade*, 388 U.S. 218, 226–27 (1967).

⁷⁴ *Kirby v. Illinois*, 406 U.S. 682, 690 (1972) (citing *Simmons v. United States*, 390 U.S. 377, 382–83 (1968)).

criminal proceedings.”⁷⁵ Thus, under the United States Constitution, the Sixth Amendment right to counsel must be afforded to the accused once formal adversarial judicial proceedings commence.⁷⁶ However, as Justice Yetka said, “[a] state is free to offer its citizens greater protection in its constitution than is offered by the federal law.”⁷⁷

2. *Minnesota's State Constitutional Right to Counsel*

In 1887, the Minnesota legislature first recognized the importance of the right to counsel when it enacted a statute guaranteeing that right for persons “restrained of liberty.”⁷⁸ The legislative intent and public policy behind this statute reflects Minnesota’s longstanding objective to afford persons “an immediate right to communicate with counsel concerning the impending proceedings against him.”⁷⁹ Consistent with the intent and form of its predecessor, the statute remains in effect today.⁸⁰

Not only is the right to counsel protected by the statute, it is also guaranteed by both the state and federal constitution. The Minnesota Constitution provides that: “In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel in his defense.”⁸¹ Despite the compatible language employed in both the Minnesota Constitution and the Federal Constitution, the United States Supreme Court’s interpretation of the federal provisions are not determinative regarding the state’s interpretation of its own state’s provisions.⁸² Thus, an individual may be afforded greater and more expansive protections under its state law than is

⁷⁵ *Kirby*, 406 U.S. at 689 (judicial criminal proceedings may include “formal charge, preliminary hearing, indictment, information, or arraignment.”).

⁷⁶ *United States v. Gouveia*, 467 U.S. 180, 187–89 (1984).

⁷⁷ *Nyflot v. Comm’r of Pub. Safety*, 369 N.W.2d 512, 523 (Minn. 1985) (Yetka, J., dissenting).

⁷⁸ 1887 Minn. Laws ch. 187, 1. (“All public officers . . . having in custody any person . . . restrained of his liberty for any alleged cause whatever, shall, except in cases of imminent danger of escape, admit any practicing attorney at law who may have been retained by or in behalf of such person so restrained of his liberty, or whom such person may desire to see or consult, to see such person and consult with him alone and in private, at the jail or other place of custody.”)

⁷⁹ *Prideaux v. State, Dep’t of Pub. Safety*, 247 N.W.2d 385, 393 (Minn. 1976).

⁸⁰ MINN. STAT. § 481.10 (2019).

⁸¹ MINN. CONST. art. I, § 6.

⁸² *State v. Murphy*, 380 N.W.2d 766, 773 (Minn. 1986) (Wahl, J., dissenting) (“[W]e are not obliged to adopt the United States Supreme Court’s construction of a federal constitutional provision in interpreting our own constitution even if the language of a state constitutional privilege is identical.”) (citation omitted); Terrence J. Fleming & Jack Nordby, *The Minnesota Bill of Rights: “Wrapt in the Old Miasmal Mist,”* 7 HAMLINE L. REV. 51, 63 (1984) (“Identical meaning should not be implied merely because there is identical language.”).

offered by the federal law.⁸³ As Chief Judge John R. Tunheim of the United States District Court for the District of Minnesota once stated:

The rebirth of state constitutional law has given states a remarkable opportunity to take a step back and examine how broadly individual rights should be protected. . . . [T]he reemergence of state constitutions presents the State of Minnesota with opportunities to interpret its constitution in a manner that truly reflects the unique values and interests of Minnesotans. Here lies the greatest value of a state constitution—its ability to react to unique local concerns and conditions.⁸⁴

Although the Sixth Amendment right to counsel does not attach until the criminal justice proceedings against an individual have reached a critical stage in federal court, state courts are free to determine the appropriate point at which criminal proceedings reach a critical stage in the respective state's constitution.⁸⁵ In *Friedman*, the Court adopted the United States Supreme Court's broad definition of "critical stage," meaning "those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel."⁸⁶ Despite the consistent terminology, the court is not bound to reach the same conclusions as its federal counterpart in determining whether a certain event constitutes a critical stage.⁸⁷ In fact, the Minnesota Supreme Court has found that the "critical stage" in a criminal proceeding attaches earlier under Minnesota's Constitution than it does under federal law. However, the court has struggled with determining whether the limited right to counsel applies at the time a test is being administered in DWI cases, which is revealed through an examination of four Minnesota Supreme Court cases that exemplify the development of qualifying this moment as a "critical stage" relative to Minnesota's DWI proceedings.⁸⁸ The following cases analyze the

⁸³ *Nylot v. Comm'r of Pub. Safety*, 369 N.W.2d 512, 523 (Minn. 1985) (Yetka, J., dissenting) ("A state is free to offer its citizens greater protection in its constitution than is offered by the federal law.").

⁸⁴ Hon. John R. Tunheim, *Criminal Justice: Expanded Protections Under the Minnesota Constitution*, 20 WM. MITCHELL L. REV. 465, 466 (1994).

⁸⁵ Matsakis & Spector, *Toward an Activist Role for State Bill of Rights*, 8 HARV. C.R.-C.L.L. REV. 271, 318-19 (1973).

⁸⁶ *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 833 (Minn. 1991); *see also* *Gerstein v. Pugh*, 429 U.S. 103, 122 (1975).

⁸⁷ *Friedman*, 473 N.W.2d at 833 n.4 ("We approved use of the terms . . . although they arose from federal doctrine, as embodying concepts that provided guidance as we examined our state constitution. We likewise make use of 'critical stage' analysis as we now interpret our Minn. Const. art. I, § 6.").

⁸⁸ *State v. Palmer*, 191 N.W.2d 188 (Minn. 1971) (holding there is no federal constitutional right to counsel before deciding whether to submit); *Prideaux v. State, Dep't of Pub. Safety*,

“critical stage” inquiry under Minnesota’s statutory right to counsel, the United States Constitutional right to counsel, and Minnesota’s Constitutional limited right to counsel.

First, in 1971, the Minnesota Supreme Court considered whether a critical stage in a criminal proceeding is reached once a driver suspected of DWI is requested to submit to chemical testing pursuant to Minnesota’s implied consent statute.⁸⁹ In *State v. Palmer*, the defendant challenged his license revocation on the grounds that he was denied his constitutional right to consult with an attorney at the time the chemical tests were requested.⁹⁰ The court rejected the defendant’s argument and upheld the revocation of his license.⁹¹ In reaching its conclusion, the court focused on the civil nature of license revocation and found “[t]he defendant, therefore, is not clothed with those substantive constitutional rights associated with criminal matters.”⁹²

In 1976, the Minnesota Supreme Court first afforded a driver suspected of DWI with the protections of the statutory right to counsel before deciding whether to submit to chemical testing is requested of a driver suspected of DWI.⁹³ In *Prideaux v. Department of Public Safety*, the court considered the public policy behind the statutory right to counsel – “to secure for the person in custody an immediate right to communicate with counsel concerning the impending proceedings against him.”⁹⁴ The

247 N.W.2d 385 (Minn. 1976) (reaffirming no federal constitutional right to counsel, but recognizing that there is a state statutory right to counsel before deciding whether to submit to chemical testing); *Nyflot*, 369 N.W.2d at 512 (considering the 1984 legislative changes to the implied consent law, the court held that there is neither a federal constitutional right nor state statutory right to counsel); *Friedman*, 473 N.W.2d at 828 (recognizing a state constitutional right to counsel before deciding whether to submit to chemical testing). In order to fully understand the limited right to counsel under Minnesota’s Constitution, these four cases should be read as a “quartet.” Transcript of Oral Argument, *State v. Rosenbush*, 931 N.W.2d 91 (Minn. 2019) (No. A18-0377).

⁸⁹ *Palmer*, 191 N.W.2d at 188.

⁹⁰ *Id.* at 189.

⁹¹ *Id.* at 191 (“The weight of authority is to the effect that because an administrative proceeding for the suspension of a driver’s license is a civil proceeding, and not a criminal prosecution, a defendant does not have a constitutional right to consult with an attorney before deciding whether to accede to an officer’s request to submit to a blood test.”).

⁹² *Id.* at 190 (“[R]evocation of a [driver’s] license is not a punishment but is rather an exercise of the police power for the protection of the public.’ . . . ‘A license revocation proceeding is civil in nature, notwithstanding the vague language . . . that the judicial hearing ‘shall proceed as in a criminal matter.’” (citations omitted)).

⁹³ *Prideaux v. State, Dep’t of Pub. Safety*, 247 N.W.2d 385 (Minn. 1976) (effectively, but not expressly overturning *State v. Palmer* which did not recognize a right to counsel before submitting to a chemical test).

⁹⁴ *Id.* at 393.

court ultimately concluded that the “importance of a driver’s license and the binding decisions which must be made by the driver asked to submit to chemical testing make the chemical-testing process a ‘proceeding’ within the meaning of § 481.10 before which consultation with counsel is to be accorded.”⁹⁵ Additionally, the court found that the person must be informed of this statutory right.⁹⁶

Although the court refrained from deciding the constitutional issues raised, it acknowledged the meaningful decision that a suspected drunk driver must make when confronted with the choice of submitting to chemical testing, reasoning that “the driver who is requested to submit to chemical testing might not know that he can reasonably refuse the test in certain circumstances where the officer did not . . . properly inform the driver of his rights, or confused the driver as to his rights.”⁹⁷ Based on the court’s analysis of hypothetical scenarios in which a suspected driver might plausibly consider declining chemical testing, it determined that the decision is critical and binding.⁹⁸ The court equated the critical and binding character of the decision to submit to chemical testing with the decision to make a verbal statement.⁹⁹

Furthermore, the court articulated its doubts concerning the validity of prior holding—that chemical testing is not a critical stage in a criminal proceeding because of the civil nature of the proceeding.¹⁰⁰ The *Prideaux* court reasoned that the “civil” label attached to driver’s license revocation proceedings is not dispositive where important constitutional rights are involved, emphasizing three reasons.¹⁰¹ First, license revocation following the failure to submit to chemical testing is “necessarily and inextricably intertwined with an undeniably criminal proceeding – namely, prosecution for driving while under the influence of an alcoholic beverage.”¹⁰² The obvious and intended purpose of the implied consent law is to coerce

⁹⁵ *Id.* (adding that if the “implied-consent statute forbids a limited right to counsel before chemical testing, that statute, which is later and more specific in its scope, would control.”).

⁹⁶ *Id.* at 394 (recognizing that law enforcement must assist in the vindication of the right to counsel).

⁹⁷ *Id.* at 390.

⁹⁸ *Id.* (considering situations in which a suspected driver might genuinely prefer refusal of the test due to the possibility of decreased criminal convictions and accept the consequences resulting from refusal, specifically the six month license revocation).

⁹⁹ *Id.* (citing *Escobedo v. Illinois*, 378 U.S. 478 (1964) and *Miranda v. Arizona*, 384 U.S. 436 (1966)).

¹⁰⁰ *Id.* at 388; *see also, e.g., State v. Palmer*, 191 N.W.2d 188 (1971) (holding a driver does not have a constitutional right to consult with counsel prior to deciding whether to submit to a chemical test).

¹⁰¹ *Prideaux*, 247 N.W.2d at 388.

¹⁰² *Id.*

drivers suspected of DWI into providing evidence that can be used against him in subsequent criminal proceedings.¹⁰³ Second, the similarity of the impact of license revocation and traditional criminal sanctions cannot be overlooked.¹⁰⁴ Thus, “we cannot allow a ‘civil’ label to obscure the quasi-criminal consequences of revocation to the ordinary citizen.”¹⁰⁵ Lastly, the court noted the significance of the decision of whether to take or refuse chemical testing, which “is arguably a ‘critical stage’” in DWI proceedings.¹⁰⁶ Although *Prideaux* was limited to statutory rights, its impact on and application to constitutional right to counsel cases cannot go unnoticed.¹⁰⁷

In *Nyflot v. Commissioner of Public Safety*, the Minnesota Supreme Court confronted challenges to the 1984 legislative amendments made to the Implied Consent Advisory based on the United States Constitution and a Minnesota Statute § 481.10¹⁰⁸ After being arrested for DWI, law enforcement read Nyflot the implied consent advisory, which in relevant part, informed her that “‘after submitting to testing,’ she had the right to consult with an attorney.”¹⁰⁹ Despite her persistent attempts to contact an attorney before deciding, Nyflot eventually refused to submit to the chemical testing.¹¹⁰ She was then permitted to contact an attorney, who advised her to accede to the officer’s request.¹¹¹ Despite her eagerness to comply after obtaining advice from her attorney, the officer told her she was no longer allowed to submit to the test.¹¹²

Nyflot argued that the legislative changes did not eliminate the statutory right to counsel recognized in *Prideaux*.¹¹³ Additionally, if they did, such legislation violates the Sixth Amendment Due Process Clause and the Equal Protection Clause of the United States Constitution.¹¹⁴ Disagreeing

¹⁰³ *Id.*

¹⁰⁴ *Friedman v. Comm’r of Pub. Safety*, 473 N.W.2d 828, 832 (citing *Prideaux*, 247 N.W.2d at 388).

¹⁰⁵ *Prideaux*, 247 N.W.2d at 389.

¹⁰⁶ *Id.*

¹⁰⁷ 1 MINNESOTA MISDEMEANORS § 17.04 [12][a]. In *Commissioner of Public Safety v. Campbell*, 494 N.W.2d 268 (Minn. 1992), the Minnesota Supreme Court suggested the case law established from *Prideaux* should be followed and relied upon in applying and interpreting *Friedman*. *Id.*

¹⁰⁸ *See generally* *Nyflot v. Comm’r of Pub. Safety*, 369 N.W.2d 512 (Minn. 1985).

¹⁰⁹ *Id.* at 513–14.

¹¹⁰ *Id.* at 514.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*; *see generally* *Prideaux v. State, Dep’t of Pub. Safety*, 247 N.W.2d 385 (Minn. 1976) (finding MINN. STAT. § 481.10 provided a statutory right to counsel when a driver is confronted with a request to submit to a chemical test).

¹¹⁴ *Nyflot*, 369 N.W.2d at 514.

with Nyflot and the Minnesota Court of Appeals, the Minnesota Supreme Court concluded that the statutory right to counsel does not attach before a suspect decides whether to submit to chemical testing.¹¹⁵ The court reasoned that “[b]ecause the legislature originally signified its adherence to the *Prideaux* ruling by amending the advisory . . . it makes sense that the legislature intended to abandon the *Prideaux* right to counsel by later amending the advisory to remove this right.”¹¹⁶ Thus, the court held that Minnesota no longer provides a statutory right to counsel when faced with the decision to submit to chemical testing.¹¹⁷

The court further held that there is no federal constitutional right to counsel when confronted with this decision.¹¹⁸ Although the court acknowledged that its decision in *Prideaux* indicated that such a decision sufficed as a “critical stage,” subsequent United States Supreme Court cases have since narrowed the definition of “critical stage.”¹¹⁹ Pursuant to federal law, the right to counsel does not attach until judicial proceedings are formally commenced.¹²⁰ Therefore, the court held that there is neither a state statutory right nor a federal constitutional right to counsel in this situation.¹²¹

In *Friedman v. Commissioner of Public Safety*, the Minnesota Supreme Court was asked to determine when Minnesota’s State Constitutional right to counsel is triggered in a DWI proceeding.¹²² The court adopted the United States Supreme Court’s definition of what constitutes a “critical stage” in a criminal proceeding, which includes “those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel.”¹²³

¹¹⁵ *Id.* at 517.

¹¹⁶ *Id.* at 515. This dissent challenged the majority’s reasoning, recognizing that “[t]his statute has never been amended. As counsel for the state admitted, the 1984 legislature was presented several proposals to amend section 481.10 to exclude specifically the implied consent situation but rejected them all. Today, by limiting the statute’s effect, this court has effectively amended the statute without legislative authorization.” *Id.* at 519–20 (Yetka, J., dissenting).

¹¹⁷ *Id.* at 515.

¹¹⁸ *Id.* at 517.

¹¹⁹ *Id.* at 515, 517; *accord* Kirby v. Illinois, 406 U.S. 682 (1972) (the plurality held that the Sixth Amendment right to counsel under the Federal Constitution does not attach until judicial proceedings are formally commenced). Subsequent cases have reinforced the plurality’s decision. *See Nyflot*, 369 N.W.2d at 516; *United States v. Gourvia*, 467 U.S. 180 (1984); *Estelle v. Smith*, 451 U.S. 454 (1981); *Moore v. Illinois*, 434 U.S. 220 (1977).

¹²⁰ *Kirby*, 406 U.S. at 688.

¹²¹ *Nyflot*, 369 N.W.2d at 517.

¹²² *Friedman v. Comm’r of Pub. Safety*, 473 N.W.2d 828, 830 (Minn. 1991).

¹²³ *Id.* at 833 (quoting *Gerstein v. Pugh*, 420 U.S. 103, 122 (1975)).

Friedman was arrested after failing a preliminary breath test and was subsequently arrested for DWI.¹²⁴ At the police station, Friedman inquired about her rights and ability to contact an attorney.¹²⁵ The officer did not allow her to speak with counsel.¹²⁶ The officer read the Implied Consent Advisory, which informed her that her “driver’s license would be revoked for one year if she refused chemical testing for blood alcohol, that the refusal or results of the test would be used against her at trial, and that she had a right to consult an attorney after testing.”¹²⁷ Although the officer read the advisory three times, Friedman did not understand the advisory and was still confused about her rights.¹²⁸ The officer deemed Friedman’s confused response a refusal, which led to a one-year license revocation pursuant to the statute applicable at the time.¹²⁹

Application of the newly adopted definition in the court’s interpretation of the Minnesota Constitution led the court to hold that any person suspected of DWI and asked to submit to chemical testing is at a “critical stage” in DWI proceedings.¹³⁰ The court relied on its reasoning in *Prideaux* concerning the decision’s significance, stating that “[a] driver must make a critical and binding decision regarding chemical testing, a decision that will affect him or her in subsequent proceedings.”¹³¹ The implied consent statute placed individuals suspected of DWI in a unique situation that required “aid in coping with legal problems or assistance in meeting their adversary.”¹³² Specifically, the court emphasized a suspected driver’s need for an “objective advisor to explain the different legal consequences.”¹³³ Thus, *Friedman* recognized that Minnesota’s Constitution afforded drivers suspected of DWI a limited right to consult with counsel before deciding whether to submit to chemical testing.

The Court clarified the applicability of the limited right to counsel recognized in *Friedman* and restricted its application only to implied consent cases because of the unique decision and consequences that come with the reading of the advisory.¹³⁴ In *State v. Hunn*, without reading the

¹²⁴ *Id.* at 829.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*; MINN. STAT. § 169.123, subdiv. 4 (1990).

¹³⁰ *Friedman*, 473 N.W.2d at 833.

¹³¹ *Id.* at 832.

¹³² *Id.* at 833.

¹³³ *Id.* (“An attorney, not a police officer, is the appropriate source of legal advice. An attorney functions as an objective advisor who could explain the alternative choices.”).

¹³⁴ *State v. Hunn*, 911 N.W.2d 816, 819–20 (Minn. 2018).

Implied Consent Advisory, an officer requested that an individual suspected of driving under the influence of a controlled substance submit to a urine test.¹³⁵ The individual agreed and the test showed amphetamine and methamphetamine in his urine.¹³⁶ He was formally charged and subsequently moved to suppress the urine test results because the officer failed to vindicate his right to counsel prior to testing by not informing him of his rights or the consequences of his decision.¹³⁷ Ultimately, the court concluded that the constitutional limited right to counsel is triggered only upon a reading of the Implied Consent Advisory.¹³⁸ Where the implied consent law is not invoked, the court found that the constitutional right to counsel does not attach until commencement of formal judicial proceedings.¹³⁹

III. THE *ROSENBUSH* DECISION

A. *Facts and Procedure*

On July 23, 2017, a Dakota County Sheriff's Deputy was dispatched to investigate a car that allegedly left the scene of an accident.¹⁴⁰ The deputy noticed front-end damage on Rosenbush's vehicle and stopped her based on his suspicion that she was involved in the car accident.¹⁴¹ Specifically, the deputy believed that Rosenbush drove into a ditch, hit a sign, and left the scene of an accident.¹⁴² The deputy conducted an investigative detention to further scrutinize his suspicion. Throughout the course of the deputy's questioning, he began to suspect that Rosenbush had consumed alcohol.¹⁴³

Rosenbush made two admissions during the conversation. First, she admitted her involvement in the car accident.¹⁴⁴ Second, she admitted to consuming "two to three beers" earlier in the day.¹⁴⁵ The deputy then requested Rosenbush perform a field sobriety test. Although she initially

¹³⁵ *Id.* at 817.

¹³⁶ *Id.* at 817-18.

¹³⁷ *Id.* at 818.

¹³⁸ *Id.* at 819-20.

¹³⁹ *State v. Nielsen*, 530 N.W.2d 212, 215 (Minn. Ct. App. 1995).

¹⁴⁰ *State v. Rosenbush*, No. A18-0377, 2018 WL 3340530, at *1 (Minn. Ct. App. July 9, 2018).

¹⁴¹ *Id.* at *1-2.

¹⁴² *State v. Rosenbush*, 931 N.W.2d 91, 93 (Minn. 2019).

¹⁴³ *Id.* In addition to an alcohol-like odor coming from Rosenbush, she was crying and slow to respond to questions. *Id.*

¹⁴⁴ *Rosenbush*, 2018 WL 3340530, at *2 (Rosenbush stated she had "misjudged a turn, gone off the road, hit a sign, and driven away.").

¹⁴⁵ *Rosenbush*, 931 N.W.2d at 93.

refused, eventually she cooperated and agreed to take the breath test.¹⁴⁶ The preliminary breath test results revealed that her alcohol concentration was over the legal limit.¹⁴⁷ At some point in the conversation, the deputy inquired about the physical marks on Rosenbush's wrists.¹⁴⁸ She informed him of her recent suicide attempt and further stated that her suicidal urges were resurfacing.¹⁴⁹

The deputy arrested Rosenbush for driving while intoxicated (DWI), but rather than transporting her to the police station, he arranged for an ambulance to bring her to the hospital to be placed on a mental health hold pursuant to the county crisis unit's recommendations.¹⁵⁰ While Rosenbush was en route to the hospital, the deputy's supervisor obtained a search warrant for a blood sample from Rosenbush, which was faxed to the hospital.¹⁵¹ Once the deputy arrived at the hospital, he served Rosenbush with the search warrant and read her the Implied Consent Advisory for blood and urine tests in compliance with Minnesota Statute section 171.177, subdivision 1.¹⁵² The test advisory informed Rosenbush that "refusal to submit to a blood or urine test is a crime," but did not convey to Rosenbush that she had a right to consult counsel before making her decision.¹⁵³ Based on this information, Rosenbush allowed a nurse to draw her blood for purposes of chemical testing.¹⁵⁴ The test results revealed that her blood alcohol concentration was over the legal limit of .08.¹⁵⁵

Rosenbush was charged with fourth-degree DWI.¹⁵⁶ Rosenbush moved to suppress the results of the blood test, arguing that the deputy failed to vindicate her limited constitutional right to counsel established in *Friedman* prior to submitting to the chemical test.¹⁵⁷ The district court granted Rosenbush's motion to suppress the results of the blood tests,

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Rosenbush*, 2018 WL 3340530, at *2.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* She was arrested pursuant to MINN. STAT. § 169A.20 (2018).

¹⁵¹ *Rosenbush*, 931 N.W.2d at 94.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*; MINN. STAT. §§ 169A.20, subdiv. 1(1), 169A.27 (2018). In addition to the DWI charges, Rosenbush was charged with leaving the scene of an accident (MINN. STAT. § 169.09, subdiv. 2 (2018)) and her driver's license was revoked under MINN. STAT. § 171.177, subdiv. 5 (2018). Neither issue was addressed on appeal. *Rosenbush*, 931 N.W.2d at 94 n.1.

¹⁵⁷ *Rosenbush*, 931 N.W.2d at 94; *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828 (Minn. 1991) (finding that the Minnesota Constitution afforded drivers suspected of DWI a limited right to counsel prior to deciding whether to comply with a chemical testing request).

finding that her constitutional rights were violated because she was not afforded the right to consult with counsel before deciding whether to submit to the blood test.¹⁵⁸ The State appealed the district court's pretrial suppression order.¹⁵⁹

B. The Minnesota Court of Appeals' Decision

On appeal, the State argued that the district court relied on inapplicable law based on the 2017 changes to the DWI laws and urged the court to hold that "the limited right to counsel recognized in *Friedman* is only implicated when chemical testing is sought under the implied consent law."¹⁶⁰ The state focused on the fact that law enforcement obtained a search warrant for Rosenbush's blood and reasoned that "a search warrant ensures that a driver's Fourth Amendment rights are protected because it is only issued after a probable-cause determination by a judge or magistrate. And because a warrant 'commands' a DWI arrestee to submit to testing, eliminating any choice to do otherwise, the testing is merely investigative."¹⁶¹ In addition to the Fourth Amendment protections, the State argued that "the existence of the warrant shields the driver from having to 'meet[] his adversary' in the form of a police officer who acts 'with full legal power of the state.'"¹⁶² Thus, the State urged the court to refuse to extend the limited right to counsel to warranted chemical tests.¹⁶³

Conversely, Rosenbush challenged the State's reasoning, contending that the limited right to counsel is triggered whenever a driver is presented with a choice of submitting to a chemical test that carries immediate consequences.¹⁶⁴ According to Rosenbush, the only time the right to counsel does not attach is "when drivers do not have the choice to refuse testing."¹⁶⁵

¹⁵⁸ *Rosenbush*, 931 N.W.2d at 94.

¹⁵⁹ *Id.*

¹⁶⁰ State v. Rosenbush, No. A18-0377, 2018 WL 3340530, at *7 (Minn. Ct. App. July 9, 2018); see also Respondent's Brief at 9, State v. Rosenbush, 931 N.W.2d 91 (Minn. 2019) (No. A18-0377) ("The district court's conclusion in this case is erroneous because the limited right to counsel under *Friedman* is inapplicable here . . . because law enforcement obtained a valid search warrant to collect the blood sample.").

¹⁶¹ *Rosenbush*, 2018 WL 3340530, at *7-8 (citing MINN. STAT. § 626.05 (2016)); State v. Condon, 497 N.W.2d 272, 275 (Minn. Ct. App. 1993) ("[I]f a driver has no choice . . . there is no need, and hence no right, to contact counsel."); see also Respondent's Brief, *supra* note 160, at 10 ("[T]he existence of a warrant alters the testing process in such a way that a driver has no legal right that must be either exercised or forfeited." (citing State v. Maddox, 825 N.W.2d 140, 144 (Minn. Ct. App. 2013))).

¹⁶² *Rosenbush*, 2018 WL 3340530, at *8 (citing *Friedman*, 473 N.W.2d at 833-34).

¹⁶³ *Id.* at *7.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at *3.

Because the existing statute affords drivers subjected to a warranted search of blood or urine a choice that carries immediate consequences, drivers suspected of DWI may nevertheless face a consequential choice concerning submission to chemical testing, despite the presence of a search warrant.¹⁶⁶

The Minnesota Court of Appeals recognized the merit of both arguments, but ultimately found in favor of the State and reversed the district court's suppression of the chemical test results.¹⁶⁷ The court's analysis focused on the inadequacy of the "unique choice" presented to Rosenbush.¹⁶⁸ The court found that Rosenbush was not presented with a unique decision because the deputy did not give Rosenbush a choice.¹⁶⁹ He did not ask for Rosenbush's consent to the test, nor inform her that her refusal would prohibit the State from obtaining her blood for the chemical test.¹⁷⁰ In short, the Court of Appeals concluded that in order for a driver suspected of DWI to have a limited constitutional right to counsel, the officer must give the suspect "a choice between alternatives that carr[y] different, significant, legal ramifications."¹⁷¹ Otherwise, a warranted search of a driver's blood does not constitute a "critical stage" of a DWI proceeding to trigger the limited constitutional right to counsel.¹⁷² The Minnesota Supreme Court granted Rosenbush's petition for review.¹⁷³

C. The Minnesota Supreme Court's Decision

The Minnesota Supreme Court framed the issue to be reviewed as follows:

The issue before us is whether a driver arrested on suspicion of DWI, read an implied-consent advisory, and presented with a

¹⁶⁶ *Id.* at *9.

¹⁶⁷ *Id.* at *8-9.

¹⁶⁸ *Id.* at *9.

¹⁶⁹ *Id.* at *10.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* The Minnesota Court of Appeals held that "although the officer knew Rosenbush had a choice about whether to submit to a test, because he chose to withhold that information from Rosenbush, the officer extinguished her constitutional right to consult with an attorney. And because the officer deliberately withheld that critical information, the court said, 'We are persuaded that the information Rosenbush received makes this case more like *Hunn* than *Friedman*.'" Appellant's Brief and Addendum at 17-18, *State v. Rosenbush*, 931 N.W.2d 91 (Minn. 2019) (No. A18-0377). But the Minnesota Supreme Court rejected this logic because although Minnesota Statute section 169A.52, subdivision 1 and section 171.177, subdivision 13 prohibit law enforcement from executing the search warrant if the driver refuses, the choice to refuse to comply with the warrant still exists regardless of the information known to the driver. *Rosenbush*, 2018 WL 3340530 at *5-6 n.8.

¹⁷² *Id.* at *4.

¹⁷³ *State v. Rosenbush*, 931 N.W.2d 91, 94 (Minn. 2019).

search warrant authorizing a search of her blood has the right “to a reasonable opportunity to obtain legal advice before deciding whether to submit to chemical testing” under Article I, Section 6 of the Minnesota Constitution.¹⁷⁴

The majority’s analysis first examined recent changes made to Minnesota’s implied consent laws.¹⁷⁵ Specifically, the court noted the significance of two differences between the current statutory provision and its predecessor: the new warrant requirement for blood and urine tests and the new fluid-test advisory. Minnesota Statute section 169A.51, subdivision 3 now requires that blood and urine tests “be conducted only pursuant to a search warrant . . . or a judicially recognized exception to the search warrant requirement” and in accordance with the procedures specified in Minnesota Statute section 171.177.¹⁷⁶ Although the breath test advisory continues to require that law enforcement inform drivers of the limited right to counsel, the new fluid-test advisory eliminates that prerequisite.¹⁷⁷ The new fluid-test advisory, pursuant to Minnesota Statute section 171.177, subdivision 1, requires police to inform drivers “that refusal to submit to a blood or urine test is a crime.”¹⁷⁸

In its analysis concerning the new warrant requirement, the majority noted that *Rosenbush*, like every person subjected to a search warrant, was presented with a choice: “comply with the warrant or be subject to criminal penalties.”¹⁷⁹ The court further went on to state that it has “never held that the Minnesota Constitution provides the subject of a search warrant with the right to consult counsel before a warrant can be executed.”¹⁸⁰ Thus, because *Rosenbush* was faced with a choice that paralleled the choice any other individual subjected to a search warrant, the choice was “not enough to justify an extension of *Friedman* to warranted searches.”¹⁸¹ In essence, the court determined that the presence of a search warrant removed the features that made the decision in *Friedman* “unique.”¹⁸² The majority explained:

¹⁷⁴ *Id.* (citing *Friedman v. Comm’r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991)).

¹⁷⁵ *Id.* at 95–97.

¹⁷⁶ *Id.* at 97; see also MINN. STAT. § 171.177, subdiv. 3(a) (2019).

¹⁷⁷ *Rosenbush*, 931 N.W.2d at 97; see also MINN. STAT. § 169A.51, subdiv. 2 (2019) (requiring that at the time a breath test is requested, an officer must inform the person: “(1) that Minnesota law requires the person to take a test . . . ; (2) that refusal to submit to a breath test is a crime; and (3) that the person has the right to consult with an attorney, but that this right is limited to the extent that it cannot unreasonably delay administration of the test.”).

¹⁷⁸ *Rosenbush*, 931 N.W.2d at 97.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 97–98.

¹⁸² *Id.*

The existence of a search warrant eliminates many of the concerns that led us to expand the right to counsel in *Friedman*. The Fourth Amendment protects “personal privacy and dignity against unwarranted intrusion by the state,” by generally requiring that police obtain a search warrant before searching a person or place. And the presence of a search warrant ensures that drivers are not faced with the unchecked “legal power of the state,” because “a neutral and detached magistrate” has been interposed. Therefore, when a suspected impaired driver is presented with a search warrant for a blood or urine test, the driver is not “meeting his adversary” in the same manner as the driver in *Friedman* because a neutral judicial officer has determined that the police may lawfully obtain a sample of the of the driver’s blood.¹⁸³

The majority’s final point centered around the meaningfulness of the driver’s choice. Under the new law, test refusal is a crime in its own right and carries a penalty similar to a DWI conviction.¹⁸⁴ According to the majority, “[t]he similarity of these penalties under the current law further cuts against the utility of counsel in this situation where little explanation of the ‘alternative choices’ and ‘legal ramifications’ is necessary.”¹⁸⁵

Ultimately, the Minnesota Supreme Court found that “conducting a search pursuant to a lawful warrant adequately safeguards the ‘human rights [and] human dignity’ about which we were concerned in *Friedman* and supplies meaningful ‘procedural protection for the rights of the criminally accused.’”¹⁸⁶ Thus, the Minnesota Supreme Court affirmed the court of appeals’ reversal of the district court’s pretrial suppression of the blood alcohol concentration results and held that the limited constitutional right to counsel recognized in *Friedman* does not apply where a suspected driver is faced with a warranted blood test.¹⁸⁷

D. The Dissent

The dissent emphasized the court’s reasoning in *Hunn*, which recognized that the limited right to counsel is triggered based on the “unique

¹⁸³ *Id.* (citation omitted).

¹⁸⁴ *Id.* at 99; see MINN. STAT. § 169A.26 (2018) (stating that refusal to submit to a chemical test constitutes a gross misdemeanor if no aggravating factors are present); MINN. STAT. § 169A.27 (2018) (stipulating that DWI constitutes a misdemeanor if no aggravating factors are present).

¹⁸⁵ *Rosenbush*, 931 N.W.2d at 99 (citing *Friedman v. Comm’r of Pub. Safety*, 473 N.W.2d 828, 833 (Minn. 1991)).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

decision” and “consequences that came with the reading of the [implied consent] advisory.”¹⁸⁸

First, the dissent parallels Rosenbush’s situation to that in *Friedman*, where the court found a unique decision existed. Like Friedman, Rosenbush was read the applicable implied consent advisory and presented with two options: “submit to a chemical test and give the police potentially incriminating evidence, or refuse and have her license automatically revoked and potentially convicted of DWI.”¹⁸⁹ The dissent emphasized the variation of the consequences involved. In *Friedman*, the driver’s consequences consisted of license revocation and potential DWI conviction. A driver in Rosenbush’s position could face not only license revocation and potential DWI conviction but, additionally, independent criminal charges for test refusal.¹⁹⁰ Therefore, the dissent argues that the unique decision Rosenbush encountered affords her the same right to counsel as the driver in *Friedman*.¹⁹¹

The dissent explicitly disagreed with the majority’s reasoning that the presence of a search warrant eradicates the “unique decision” recognized in *Friedman* because of the customary scenario. The majority reasoned that the decision regarding one’s compliance with a search warrant is not a “unique decision” because every individual subjected to a search warrant must make the same decision—comply with the warrant or bear the punishment for refusal.¹⁹² While the dissent acknowledged the validity of the consequences for refusal to comply with a search warrant, it argued that the implied consent law is *sui generis*¹⁹³ because it expressly prohibits law enforcement from executing a search warrant and conducting a chemical test after a driver’s refusal, albeit with certain exceptions.¹⁹⁴ In any other context, police may be authorized to use reasonable force in order to execute the search warrant when faced with refusal to comply.¹⁹⁵ Because the implied consent law forbids law enforcement from executing the search

¹⁸⁸ *Id.* at 100 (Hudson, J., dissenting) (citing *State v. Hunn*, 911 N.W.2d 816, 819–20 (Minn. 2018)).

¹⁸⁹ *Id.* (citing MINN. STAT. §§ 169A.21, subdiv. 1, 2(2), 171.177, subdiv. 4 (2018)).

¹⁹⁰ *Id.* (citing MINN. STAT. § 169A.26 (2018)) (making a first-time test refusal a gross misdemeanor).

¹⁹¹ *Id.* at 100–01.

¹⁹² *Id.* at 101.

¹⁹³ *Sui Generis*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“Of its own kind or class; unique or peculiar.”).

¹⁹⁴ *Rosenbush*, 931 N.W.2d at 101.

¹⁹⁵ *Id.* (citing MINN. STAT. § 171.177, subdiv. 13 (2018)) (“If a person refuses to permit a blood or urine test as required by a search warrant . . . then a test must not be given.”); see also MINN. STAT. § 169A.52, subdiv. 1 (2018) (including the same prohibition for breath tests).

warrant, it is distinguishable from search warrants in any other context.¹⁹⁶ Thus, the dissent concluded that the presence of a search warrant does not change the fact that the driver is faced with a unique decision, and that decision should trigger the limited right to counsel announced in *Friedman*.¹⁹⁷

The dissent then focused on the fundamental differences encompassed by the Fourth and Sixth Amendment and the country's precedent. It articulated that search warrants are meant to protect the Fourth Amendment right to be free from unreasonable searches and seizures.¹⁹⁸ Ultimately, search warrants protect individual privacy.¹⁹⁹ The Sixth Amendment right to counsel, in contrast, is meant to protect the average individual lacking the legal skill and knowledge to adequately defend himself.²⁰⁰ The dissent concluded, "[b]ecause the Fourth Amendment and the right to counsel protect fundamentally different interests, the presence of one does not negate the utility of the other."²⁰¹

Lastly, the dissent rejected the majority's analysis that the presence of a search warrant ameliorates the concerns presented in *Friedman*.²⁰² It acknowledged that a search warrant will aid a driver in "meeting his adversary," but emphasized lingering concerns that a search warrant cannot resolve.²⁰³ The possibility that drivers may be confused about the "legal ramifications" of their decisions under the implied consent advisory urged the court to provide a limited right to counsel.²⁰⁴ A search warrant is obviously unable to provide "aid in coping with legal problems" to drivers,

¹⁹⁶ *Rosenbush*, 931 N.W.2d at 101 (Hudson, J., dissenting) ("Thus—in a white-collar criminal investigation, for instance—an individual's 'choice' in deciding whether to comply with a warrant is not the same as a driver's choice in deciding whether to submit to chemical testing under the implied-consent law.").

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* (citing U.S. CONST. amend. IV).

¹⁹⁹ *Id.* (citing *Schmerber v. California*, 384 U.S. 757, 767 (1966)) (regarding "personal privacy and dignity"); *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016); *Winston v. Lee*, 470 U.S. 757 (1985).

²⁰⁰ *Rosenbush*, 931 N.W.2d at 101 (Hudson, J., dissenting) ("The right to counsel, on the other hand, 'protect[s] the lay person who 'lacks both the skill and knowledge' to defend him- or herself.'" (citing *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 833 (Minn. 1991))).

²⁰¹ *Id.*; *Deegan v. State*, 711 N.W.2d 89, 98 (Minn. 2006) ("[O]ur view, under the Minnesota Constitution, [is] that a defendant's access to the other protections afforded in criminal proceedings cannot be meaningful without the assistance of counsel.").

²⁰² *Rosenbush*, 931 N.W.2d at 101 (Hudson, J., dissenting).

²⁰³ *Id.* at 102 (Justice Hudson noted that this concern was not the driving force behind the recognition of a limited right to counsel in *Friedman*).

²⁰⁴ *Id.*

and thus the limited right to counsel is still necessary.²⁰⁵ Additionally, a driver asked to submit to chemical testing is confronted with a “critical and binding” decision that will affect the driver in subsequent DWI proceedings.²⁰⁶ A search warrant does not make the decision any less critical nor binding because it cannot stop the driver’s decision from “impair[ing] defense on the merits” if they submit to the testing.²⁰⁷

IV. ANALYSIS

A. Problems with Minnesota Statute Section 171.177

The Legislature’s enactment of Minnesota Statute section 171.177 is a logical response to the United States Supreme Court’s holding in *Birchfield*²⁰⁸ and the Minnesota Supreme Court’s holdings in *Thompson*²⁰⁹ and *Trahan*.²¹⁰ Collectively, those cases held that for test refusal to be actionable as a criminal offense, it must be supported by a valid search warrant. Thus, subdivision 1 requires that chemical testing of blood and urine be conducted pursuant to a search warrant.²¹¹ Rather than maintaining consistency in the procedural execution of search warrants, the statute included various provisions that limit law enforcement’s ability to lawfully execute the search warrant and obtain the object of the search under this statute. These provisions clearly contradict the fundamental purpose of a search warrant and modify the procedural execution of search warrants under the implied consent law.

First, Minnesota Statute section 171.177, subdivision 2 provides that test refusal is only actionable where a driver refuses to take both a blood and urine test.²¹² This “choice of test” option is provided to accommodate drivers who may have a “reasonable aversion to giving a blood or urine

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016).

²⁰⁹ *State v. Thompson*, 886 N.W.2d 224 (Minn. 2016).

²¹⁰ *State v. Trahan*, 886 N.W.2d 216 (Minn. 2016).

²¹¹ MINN. STAT. § 171.177, subdiv. 1 (2019).

²¹² *Id.* § 171.177, subdiv. 2 (“If the person to whom the test is directed objects to the test, the officer shall offer the person an alternative test of either blood or urine. Action may be taken against a person who refuses to take a blood test only if a urine test was offered and action may be taken against a person who refuses to take a urine test only if a blood test was offered.”);

see also MINN. STAT. § 169A.51, subdiv. 4 (2019) (stating the same rule but clarifying that this limitation does not apply to an unconscious person).

sample.”²¹³ Offering drivers this choice could be reasonable if the two tests produce equally reliable results. However, blood and urine tests are far from equivalent. Because urine test results are consistently less accurate than blood test results, most states find urine test results inadmissible in DWI proceedings.²¹⁴ In fact, only eleven states, including Minnesota, admit urine testing in DWI prosecutions.²¹⁵ Despite the fact that most studies demonstrate that urine alcohol concentrations do not correlate well with BACs, the Minnesota Supreme Court has upheld the validity and use of urine alcohol concentrations.²¹⁶ Although they may be admissible, expert DWI defense attorneys advise drivers to choose urine tests over blood tests because they are most likely to be deemed inadmissible.²¹⁷

Second, Minnesota Statute section 171.177, subdivision 13 prohibits law enforcement from executing a search warrant if the driver refuses to submit to the warranted chemical test.²¹⁸ Essentially, this provision requires the driver's consent before the search warrant can be lawfully executed. By including this provision in the statute, the legislature effectively constructed a novel power that now allows drivers to prevent the execution of a judicial order. Not only is this additional requirement unique to search warrants executed under this statute, but it also contradicts the very nature of search warrants.

The Minnesota Legislature has defined a search warrant as an “order in writing, in the name of the state, signed by a court other than a court exercising probate jurisdiction, directed to a peace officer, *commanding* the peace officer to make a search as authorized by law and hold any item seized, subject to the order of a court.”²¹⁹ However, under Minnesota Statute section 171.177, subdivision 13, a search warrant does not hold the same meaning because it no longer *commands* a police officer to execute the lawfully authorized search but rather requires law enforcement to obtain a driver's consent first.

²¹³ State v. Hagen, 529 N.W.2d 712, 715 (Minn. Ct. App. 1995) (citing Franko v. Comm'r of Pub. Safety, 432 N.W.2d 469, 472 (Minn. Ct. App. 1988)).

²¹⁴ Robert H. Williams & Jerrold B. Leikin, *Medicolegal Issues and Specimen Collection for Ethanol Testing*, 30 LABORATORY MEDICINE 530, 534 (1999).

²¹⁵ Maury D. Beaulier, *Winning DWI: Challenging the Urine Test*, HG.ORG <https://www.hg.org/legal-articles/winning-dwi-challenging-the-urine-test-7973> [<https://perma.cc/A4EM-FSDZ>].

²¹⁶ Williams & Leikin, *supra* note 214, at 534 (“Some physicians may use this [urine/blood] ratio to estimate BAC in a clinical or emergency setting. However, it should never be used to calculate a BAC for medicolegal purposes.”).

²¹⁷ Beaulier, *supra* note 215.

²¹⁸ MINN. STAT. § 171.177, subdiv. 13 (2019).

²¹⁹ MINN. STAT. § 626.05, subdiv. 1 (2019) (emphasis added).

Lastly, refusal to submit to the warranted chemical testing constitutes an independent criminal charge.²²⁰ In every other context, “obstructing legal process” is the criminal charge that attaches to refusal to comply with a search warrant.²²¹ Yet, pursuant to subdivision 13(b), chemical test refusal is not criminally punishable as obstructing legal process unless it involves the use of force or violence or the threat of force or violence.²²² There is no valid rationale for the distinction between the respective legal ramifications. The imposition of differing charges further exemplifies the peculiar role search warrants play in the implied consent law context, pursuant to section 171.177.

A more sensical statute would impose the search warrant requirement for chemical testing of fluid samples, but would omit the aforementioned provisions that provide the driver with the ability to control which test is administered, limit the execution of the search warrant, and prevent law enforcement from obtaining the fluid samples. Without these provisions, any refusal to comply with the search warrant would be treated as obstructing legal process, rather than chemical testing refusal. The omission of these provisions would eliminate any confusion regarding a driver’s limited right to counsel because in the typical search warrant situation, Minnesota’s Constitution does not provide the subject of a search warrant with the right to counsel. However, the current statute provides no clarity concerning the limited right to counsel. In fact, it creates a new situation, one which should afford drivers the limited right to counsel based on the court’s reasoning in *Friedman*.

B. The Minnesota Supreme Court Got It Wrong

In *Rosenbush*, the court overlooked the existence of the same fundamental concerns that supported its decision to afford accused drivers

²²⁰ See MINN. STAT. § 169A.26, subdiv. 1(b) (2018) (criminalizing refusal to submit to chemical test as a third-degree DWI).

²²¹ Compare MINN. STAT. § 609.50, subdiv. 2 (2019) (stating that if the violation did not “create[] a risk of death, substantial bodily harm, or serious property damage” and was not “accompanied by force or violence or the threat thereof,” the violation is punishable by “imprisonment for not more than 90 days or to payment of a fine of not more than \$1,000”), with MINN. STAT. § 169A.26, subdiv. 1(b) (2019) (pronouncing that a refusal to submit to chemical testing constitutes a third degree DWI and is punishable by up to one year in prison and a \$3,000 fine).

²²² MINN. STAT. § 171.177, subdiv. 13(b) (2019) (“A refusal to submit to a[n] alcohol concentration] test does not constitute a violation of section 609.50 [obstructing legal process], unless the refusal was accompanied by force or violence or the threat of force or violence.”); see also MINN. STAT. § 169A.52, subdiv. 1 (2019).

the limited right to counsel in *Friedman*.²²³ After Rosenbush was arrested, the officer presented her with a search warrant for her blood sample and informed her that refusal is a crime.²²⁴ At that moment, she was faced with a unique choice that would follow her through subsequent criminal proceedings. Namely, she was forced to determine whether it would be in her best interest to submit a blood sample for chemical testing purposes and possibly give the police not only incriminating evidence—but potentially provide the police with proof of her guilt—or decline to submit to the chemical testing and suffer the consequences of refusal. In *Friedman*, the court found that the “Minnesota Constitution protects the individual’s right to consult counsel when confronted with this decision.”²²⁵

Despite the analogous decision involved in *Rosenbush*, the Minnesota Supreme Court declined to extend the limited right to counsel to the execution of a search warrant for a suspected impaired driver’s blood, finding that a lawful and warranted search “adequately safeguards the ‘human rights [and] human dignity’” it was concerned with in *Friedman* and “supplies meaningful ‘procedural protection for the rights of the criminally accused.’”²²⁶ The court is wrong. The foundation of the court’s holding is based on the assertion that the existence of a search warrant fundamentally changes the situation created in *Friedman* and thus, does not support extending the limited right to counsel to warranted searches.²²⁷ Specifically, the court emphasized that the presence of a search warrant removes the peculiarity of the decision created by the Implied Consent Advisory by transforming it into one that every person subjected to a search warrant faces—deciding whether to comply with the search warrant or oppose the warrant and incur criminal penalties.²²⁸ Thus, a driver’s decision is no longer unique because it is one that is routinely made by every individual

²²³ State v. Rosenbush, 931 N.W.2d 91, 100 (Minn. 2019) (Hudson, J., dissenting) (“The legal ramifications of the decision to submit (or not submit) to chemical testing after the advisory reading are significant. . . it may not be clear to a driver faced with the advisory whether the consequences for consenting or refusing will be worse.’ We affirmed that this ‘unique decision’ and the ‘consequences that come with the reading of the advisory’ are the reasons that drivers have a limited right to counsel when chemical testing is requested under the implied-consent law.” (quoting State v. Hunn, 911 N.W.2d 816, 819–20 (Minn. 2018))).

²²⁴ *Id.* at 94 (majority opinion); see also MINN. STAT. § 171.177, subdiv. 1 (2019) (requiring that “[a]t the time a blood or urine test is directed pursuant to a search warrant . . . the person must be informed that refusal to submit to a blood or urine test is a crime”).

²²⁵ *Friedman v. Comm’r of Pub. Safety*, 473 N.W.2d 828, 833 (Minn. 1991).

²²⁶ *Rosenbush*, 931 N.W.2d at 99 (quoting *Friedman*, 473 N.W.2d at 836).

²²⁷ *Id.* at 97.

²²⁸ *Id.* at 98 (citing MINN. STAT. § 609.50, subdiv. 1(1) (2019)) (making it a crime to obstruct, hinder, or prevent a police officer from lawfully executing any legal process).

confronted with a search warrant.²²⁹ However, an examination of the idiosyncrasies of the implied consent law demonstrates that the court's simplified analysis is lacking.²³⁰

Although it is a criminal offense to “obstruct, hinder, or prevent a police officer from lawfully executing any legal process,”²³¹ police are permitted to continue executing the warranted search warrant despite a subject's failure to comply.²³² In executing the search, officers may not only detain individuals without violating the Fourth Amendment, but are also permitted to use reasonable force to execute the warrant when faced with defiance.²³³ As the dissent recognized, the implied consent law is *sui generis*.²³⁴ Distinct from the execution of warrants in every other context, the implied consent law essentially requires the driver's consent prior to executing the warrant for blood or urine.²³⁵ Where a driver refuses to submit to the warrant, Minnesota Statute section 171.177, subdivision 13 expressly prohibits law enforcement's execution of the warrant.²³⁶ Although refusal to comply with the search warrant carries independent criminal charges, this provision in the implied consent statute allows a driver to effectively ensure that law enforcement will not obtain his or her blood or urine. Similar to the implied consent law, failure to comply with search warrants in all other contexts may constitute an actionable criminal offense. However, the crucial distinction is that failure to comply in other contexts does not prevent law enforcement from obtaining the object of the warrant. Thus, the decision to submit to warranted chemical testing is not the same as the decision to

²²⁹ *Id.*

²³⁰ *Id.* at 101 (Hudson, J., dissenting).

²³¹ See MINN. STAT. § 609.50 (2019) (imposing either misdemeanor, gross misdemeanor, or felony charges on individuals who obstruct legal process).

²³² See *State v. Young*, No. C4-03-375, 2003 WL 22999377, at *3-5 (Minn. Ct. App. Dec. 23, 2003).

²³³ MINN. STAT. § 609.06, subdiv. 1 (2019); see also *Young*, 2003 WL 22999377, at *10 (finding the officer's deadly use of force against an individual resisting the officer's execution of the warrant was reasonable based on the totality of the circumstances); *Graham v. Connor*, 490 U.S. 386, 396-97 (1989) (“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . [T]he ‘reasonableness’ inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”) (citations omitted).

²³⁴ *Rosenbush*, 931 N.W.2d at 101 (Hudson, J., dissenting).

²³⁵ MINN. STAT. § 171.177, subdiv. 13 (2019).

²³⁶ *Id.* (“If a person refuses to permit a blood or urine test as required by a search warrant . . . then a test must not be given.”).

comply with a search warrant.²³⁷ The court missed a crucial component of its analysis by overlooking the significant distinction of these decisions and erred in its conclusion that the decision encountered by drivers under the implied consent law is no longer “unique” based on the presence of a search warrant.

The court further justified its holding based on the assertion that the presence of a search warrant resolves the concerns that led to its holding in *Friedman*.²³⁸ The court determined that a search warrant transforms the encounter with law enforcement so that the “driver is not ‘meeting his adversary’ in the same manner as the driver in *Friedman* because a neutral judicial officer has determined that the police may lawfully obtain a sample of the driver’s blood.”²³⁹ However, the driver must consent to the search in order for the officer to execute the warrant. Thus, before the officer may lawfully obtain a sample of the driver’s blood, the driver is confronted with the same decision as in *Friedman*: comply or not comply with the warrant. The addition of the search warrant requirement did not eliminate, nor reduce, the uniqueness of a driver’s choice; it merely created an additional procedural step law enforcement must take under the implied consent law.

The court next found that the legislative “changes to Minnesota’s Impaired Driving Code have made a driver’s choice less meaningful” based on the similar penalties imposed by test refusal and test failure.²⁴⁰ Because the penalties are similar, the utility of counsel is diminished in this situation because “little explanation of the ‘alternative choices’ and ‘legal ramifications’ is necessary.”²⁴¹ Not only are the consequences attached to the decision more severe today than they were when *Friedman* was decided,²⁴² but Minnesota’s Impaired Driving Code is significantly more complicated

²³⁷ *Rosenbush*, 931 N.W.2d at 101 (Hudson, J., dissenting) (“Regardless of the presence of a warrant, the implied-consent law continues to require drivers to make a unique decision and, therefore, should trigger the limited right to counsel announced in *Friedman*.”).

²³⁸ *Id.* at 99 (majority opinion) (“[T]he presence of a warrant ameliorates the concerns that we articulated in *Friedman*.”); see also *Friedman v. Comm’r of Pub. Safety*, 473 N.W.2d 828, 833 (Minn. 1991) (indicating concern for a driver’s need for an objective advisor to explain alternative choices and legal ramifications arising from the decision to refuse or allow a chemical test).

²³⁹ *Rosenbush*, 931 N.W.2d at 98 (citing *Friedman*, 473 N.W.2d at 833).

²⁴⁰ *Id.* at 98–99. Compare MINN. STAT. § 169A.26 (2019) (making refusal to submit to a chemical test a gross misdemeanor if no aggravating factors are present), with MINN. STAT. § 169A.27 (2019) (making DWI a misdemeanor if no aggravating factors are present).

²⁴¹ *Rosenbush*, 931 N.W.2d at 98–99 (citing *Friedman*, 473 N.W.2d at 833).

²⁴² When *Friedman* was decided, the consequence for test refusal was limited to civil license revocation. At that time, a driver’s license was suspended for 90 days for test failure and one year for refusal to submit to the chemical test. MINN. STAT. § 169.123 subdiv. 4 (1990).

now than it was when *Friedman* was decided.²⁴³ As of July 1, 2017, Minnesota's Impaired Driving Code takes up forty-six pages of criminal code, filled with legal intricacies unknown to the layman. As Rosenbush argued, "[i]f ever someone needed the assistance of counsel, it would be to explain that despite a court order compelling a police officer to secure a sample of their blood, they could render the order toothless simply by uttering the word 'no.'"²⁴⁴ Yet, despite the new imposition of criminal consequences for refusal and the increased complexities of the DWI law, the court determined that the presence of a search warrant and the reading of the condensed advisory adequately inform and equip drivers to make this decision without the aid of counsel. Perhaps the procedural protection of a search warrant and an explanatory advisory would be capable of safeguarding the rights of a driver suspected of DWI, but the protections provided by the current application of the two shields is clearly inadequate.

C. *Inadequate Fluid Test Advisory*

In 2017, the Minnesota Legislature enacted Minnesota Statute section 171.177 and amended the implied consent statute. The pertinent modifications regarding the procedural requirements of obtaining blood and urine samples for chemical testing purposes under the new laws are the fluid-test advisory and the addition of the search warrant requirement.²⁴⁵ Similar to the statutory amendments made in response to the *Friedman* holding, the Legislature effectively omitted relevant information from the fluid-test advisory.²⁴⁶ The breath test advisory continues to require police

²⁴³ When *Friedman* was decided, the consequences for test refusal were limited to the civil sanction of license revocation. *Id.* At that time, that DWI statute and the implied consent statute made up less than ten pages of criminal code. *See id.* at §§ 169.121–.1231. Today, Minnesota's Impaired Driving Code is forty-six pages long. Transcript of Oral Argument, *supra* note 88.

²⁴⁴ Appellant's Brief and Addendum, *supra* note 171, at 21.

²⁴⁵ *Rosenbush*, 931 N.W.2d at 97.

²⁴⁶ *Davis v. Comm'r of Pub. Safety*, 517 N.W.2d 901, 902 (Minn. 1994) ("Before *Friedman* the statutory standard advisory informed each DWI arrestee, among other things: (a) Minnesota law requires that the person take a test to determine if the person is under the influence of alcohol or a controlled substance; (b) if the person refuses testing, the person's driver's license will be revoked for at least one year; (c) if the test is taken and the results show an alcohol concentration of .10 or more, the person's driver's license will be revoked for at least 90 days; (d) whether the test is taken or refused, the person may be subject to criminal penalties for DWI; (e) after testing the person may consult with an attorney; (f) after testing the person has the right to obtain additional testing, while in custody, by someone of the person's choosing; and (g) the refusal to take a test may be offered in evidence against the person at trial. Following *Friedman* . . . the legislature dropped (b), (c), (d), (f), and (g) from the old advisory.").

officers to inform drivers of the limited right to counsel, the blood and urine test advisory only requires police to inform drivers that “refusal to submit to a blood or urine test is a crime.”²⁴⁷ Although the right to counsel announced in *Friedman* was subsequently codified in statute, it is a constitutional requirement.²⁴⁸ A constitutional requirement cannot be eliminated through legislation. Thus, the court’s focus on the application of these legislative changes in relation to the right to counsel under the implied consent law are misplaced.

In *Davis*, the constitutionality of the 1993 amendments to the Implied Consent Advisory were challenged. Despite the court’s concerns regarding the “deficiencies of the current advisory,” it ultimately upheld the legislative amendments, concluding “[o]nce the supreme court announced the limited right to counsel in *Friedman*, the legislature had the power to shift from the police officer to the attorney the burden of informing the driver about the details of rights and sanctions under the implied consent law.”²⁴⁹ As Rosenbush argued:

Remembering that the truncated implied consent advisory was only upheld against a due process challenge in *Davis* because it was supplemented by the right to discuss the missing information with an attorney, this new statute is constitutionally unsound where it provides only a single crumb of information regarding a driver’s rights and obligations, while at the same time depriving the driver of the right to legal consultation - what the court of appeals referred to as *Friedman*’s “main protection.”²⁵⁰

The truncated advisory mandated by the new implied consent law, coupled with the court’s decision in *Rosenbush*, infringes upon a suspected driver’s right to obtain full and accurate information concerning the decision, its alternatives, and the legal ramifications involved. In 1991, when the Minnesota Supreme Court first recognized the state constitutional right to consult with counsel before submitting to a chemical test, the Implied Consent Advisory encompassed specific and comprehensive explanations

²⁴⁷ MINN. STAT. §§ 169A.51, subdiv. 2, 171.177, subdiv. 1 (2019). As Rosenbush argued, “There is no justification for either the legislature or the courts to treat those being asked to submit to a fluid test any differently than those being asked to submit to a breath test. By doing so, both the legislature and the court of appeals have ignored this court’s directive that the Minnesota Constitution affords all drivers being asked to make a choice about submitting to impaired driving testing the limited right to consult with an attorney before doing so.” Appellant’s Brief and Addendum, *supra* note 171, at 23.

²⁴⁸ See Comm’r of Pub. Safety v. Campbell, 494 N.W.2d 268, 269 (Minn. 1992) (recognizing that the limited right to counsel recognized in *Friedman* is based on the right under the state constitution rather than statutory rights).

²⁴⁹ *Davis*, 517 N.W.2d at 902-04.

²⁵⁰ Appellant’s Brief and Addendum, *supra* note 171, at 25-26.

of the obligation and consequences of either taking or refusing a test.²⁵¹ At that time, a driver had the right to consult with counsel, but only after deciding to submit to the chemical test.²⁵² Despite the informative advisory and the federal precedent—holding that drivers had no federal constitutional right to assistance of counsel at this stage of the process—the Minnesota Supreme Court found that drivers had the right, under Minnesota’s state constitution, to consult with counsel *before* deciding whether to submit to the chemical test.²⁵³ Ultimately, the court stated:

[W]e hold that the point at which an individual is asked by law enforcement officials to undergo a blood alcohol test constitutes a critical stage in the criminal process and that article I, section 6 of the Minnesota Constitution guarantees an individual in such a situation the limited right to counsel within a reasonable time before submitting to testing[.]²⁵⁴

As Rosenbush correctly pointed out, the same five conditions²⁵⁵ that urged the Minnesota Supreme Court to oppose statutory provisions and afford drivers the right to a pre-test consultation are even more important today, under Minnesota Statute section 171.177.²⁵⁶ Now, drivers are forced to rely on the information provided by the advisory because they no longer have the limited right to counsel. When Rosenbush was confronted with the critical and binding decision concerning compliance with the search

²⁵¹ MINN. STAT. § 169.123 (1990). The advisory informed drivers that Minnesota law required them to submit to a test of blood, breath, or urine to determine if they were under the influence of alcohol and that their licenses would be revoked for a specified period of time if the results were greater than 0.10. Additionally, they were informed that refusal to comply with the test request would increase the period their license would be revoked, and they may face criminal prosecution if they had prior alcohol-related license revocation on record. Refusal could be used as evidence against them in a criminal trial. Finally, drivers were informed that they had the right to obtain an additional test at their own expense while in custody and could consult with an attorney, but only after deciding to submit to the state’s test.

²⁵² *Id.*

²⁵³ *Friedman v. Comm’r of Pub. Safety*, 473 N.W.2d 828, 833–34 (Minn. 1991).

²⁵⁴ *Id.* at 837.

²⁵⁵ The five conditions are:

1. Drivers had no constitutional right to refuse a test of any sort; 2. Drivers had the statutory option to refuse a test, despite having no constitutional right to do so; 3. If the driver refused a test, none would be administered; 4. Drivers could be prosecuted for refusing to submit to a test; and 5. The Commissioner of Public Safety would take immediate, pre-hearing action against the driver’s license of any driver who either failed or refused a test.

Appellant’s Brief and Addendum, *supra* note 171, at 18–19.

²⁵⁶ *Id.* at 21.

warrant, the only information she was afforded came from the deputy.²⁵⁷ After serving Rosenbush with the warrant for her blood, the deputy informed her that failure to submit to the test is a crime.²⁵⁸ Not only was this information insufficient, it was also inaccurate. Minnesota Statute section 171.177, subdivision 2 states:

If the warrant authorizes either a blood or urine test, the officer may direct whether the test is of blood or urine. If the person to whom the test is directed objects to the test, the officer shall offer the person an alternative test of either blood or urine. Action may be taken against a person who refuses to take a blood test only if a urine test was offered and action may be taken against a person who refuses to take a urine test only if a blood test was offered.²⁵⁹

Rosenbush could not have been prosecuted for the crime of test refusal based solely on failure to comply with the search warrant for a blood sample. For Rosenbush's failure to submit to constitute a criminal offense, she would have had to refuse to comply not only with the blood test, but also with a urine test. Because the search warrant only authorized the search of Rosenbush's blood, the deputy would have had to apply for a subsequent search warrant for Rosenbush's urine and request that she submit to the urine test.²⁶⁰ Rosenbush's refusal to comply with the search warrant would only become a crime upon her failure to submit to the subsequent urine test.²⁶¹ Not only was the advisory, as stated in Minnesota Statute section 171.177, subdivision 1 inadequate, it arguably violated Rosenbush's due process rights.²⁶² This problem is not unique to Rosenbush's situation, but could happen whenever a search warrant limits the search to obtaining only one of the two applicable fluid samples.

²⁵⁷ The Minnesota Supreme Court has previously recognized that "[a]n attorney, not a police officer, is the appropriate source of legal advice. An attorney functions as an objective advisor who could explain the alternative choices." *Friedman*, 473 N.W.2d at 833.

²⁵⁸ *State v. Rosenbush*, 931 N.W.2d 91, 94 (Minn. 2019).

²⁵⁹ MINN. STAT. § 171.177, subdiv. 2 (2019).

²⁶⁰ Although it is possible for a search warrant to specify blood and/or urine, the search warrant involved in *Rosenbush* was only for a blood sample. *See Rosenbush*, 931 N.W.2d at 93.

²⁶¹ MINN. STAT. § 171.177, subdiv. 13 (2019); *see also* Transcript of Oral Argument, *supra* note 88.

²⁶² In determining that a license revocation violated due process rights, the court in *McDonnell v. Commissioner of Public Safety*, 473 N.W.2d 848 (Minn. 1991) relied on the three elements from *Johnson v. Commissioner of Public Safety*:

(1) the person whose license was revoked submitted to a breath, blood, or urine test; (2) the person prejudicially relied on the implied consent advisory in deciding to undergo testing; and (3) the implied consent advisory did not accurately inform the person of the legal consequences of refusing to submit to the testing. 911 N.W.2d 506, 508-09 (Minn. 2018).

An additional shortcoming of the advisory is that it fails to inform suspected drivers that failure to submit is potentially a more serious offense with more severe consequences than a DWI conviction. There are plausible circumstances where a driver suspected of DWI might think it advantageous to refuse the chemical testing in order to decrease the possibility of criminal DWI conviction.²⁶³ To a layman, conviction for chemical test refusal may seem less severe than DWI conviction. However, to the contrary, first-time test refusal carries more severe consequences than first-time test failure.²⁶⁴ A driver's first-time test failure constitutes a misdemeanor offense, which may result in a \$1000 fine and a 90-day jail sentence,²⁶⁵ whereas a driver's first-time test refusal constitutes a gross misdemeanor and can result in a \$3000 fine and potentially one year in prison.²⁶⁶ Without knowledge of, or access to, this information, drivers like Rosenbush are forced to make ill-informed decisions that could carry significant consequences throughout subsequent criminal proceedings. As Justice Hudson stated, "A search warrant will not give drivers 'aid in coping with legal problems,' and will not stop their decisions from 'impair[ing] defense on the merits' if they submit to testing."²⁶⁷ Drivers suspected of DWI require an objective advisor to explain the differing legal ramifications of the choices. Because neither the advisory nor the search warrant can adequately fulfil this need, Minnesota's state constitutional limited right to counsel, recognized in *Friedman*, should apply when a driver is asked to submit to warranted chemical testing.

It is important to note that the purpose behind the implied-consent advisory is to "inform a driver of the serious consequences of refusal in an

²⁶³ In *Prideaux*, the court recognized, "depending upon the individual driver's circumstances, the decreased possibility of criminal conviction may be worth the 6-month loss of his license if he does not depend on his driver's license for his livelihood." *Prideaux v. State, Dep't of Pub. Safety*, 247 N.W.2d 385, 390 (Minn. 1976). Although the current legal ramifications associated with test refusal are different from when *Prideaux* was decided, the reasoning behind the court's analysis still applies.

²⁶⁴ MINN. STAT. §§ 169A.26-.27 (2019); *Rosenbush*, 931 N.W.2d at 102 (Hudson, J., dissenting) ("[F]irst-time test refusal is a gross misdemeanor and first-time test failure is a misdemeanor when no aggravating factors are present.").

²⁶⁵ MINN. STAT. § 169A.03, subdiv. 12 (2019) (defining "misdemeanor"); *Rosenbush*, 931 N.W.2d at 102 ("A driver who submits to a test but fails is subject to a 90-day license revocation if no aggravating circumstances are present." (citing MINN. STAT. § 169A.52, subdiv. 4(a)(1) (2018))).

²⁶⁶ MINN. STAT. § 169A.03, subdiv. 8 (2019) (defining "gross misdemeanor"); *Rosenbush*, 931 N.W.2d at 103 ("[A] driver who refuses a [chemical] test is subject to a 1-year [license] revocation." (citing MINN. STAT. § 169A.52, subdiv. 3(a)(1) (2018))).

²⁶⁷ *Rosenbush*, 931 N.W.2d at 102.

effort to compel the driver to take the test.”²⁶⁸ At a time when civil license revocation was the only consequence associated with test refusal, the *Scott* court stated, “[w]hen compared to the 90-day minimum revocation for taking but failing the test, the civil consequences strongly compel the driver to take the test.”²⁶⁹ Now, despite the increased severity of the consequences associated with refusal, the persuasive pressures urging compliance lose effect because drivers are not given full information, nor the opportunity to consult with counsel. The State argued that affording drivers a limited right to counsel in this context “implies that counsel would not only advise a suspect to violate the law by refusing a test, but [] also [] provide[s] the opportunity to advise suspects to ignore a court order.”²⁷⁰ That simply is not true. In fact, the underlying purpose of the advisory—encourage compliance—is actually strengthened by the presence of counsel. Lawyers must abide by ethical duties and obligations, one of which prohibits counsel from advising a client to engage in criminal or fraudulent conduct.²⁷¹ Instead of advising drivers to refuse to comply with the search warrant, lawyers provide clarity regarding the severe consequences of test refusal, which may not be generally known by a driver. Thus, drivers are arguably more likely to comply with the search warrant when they are afforded complete and accurate information by a trusted counselor. For example, in *Friedman*, the suspected driver, confused by the advisory, requested to speak with counsel.²⁷² She was informed that she could only speak to counsel after deciding whether she would submit.²⁷³ After refusing to submit to the chemical test, she called her lawyer.²⁷⁴ He informed her that it would be in

²⁶⁸ *State v. Mike*, 919 N.W.2d 103, 113 (Minn. Ct. App. 2018); *see also* *Tyler v. Comm’r of Pub. Safety*, 368 N.W.2d 275, 280 (Minn. 1985) (“The advisory is not designed to persuade a driver *not* to take a test; rather, it is aimed at letting a driver know the serious consequences of his refusal to take a test.”) (emphasis added); *State v. Scott*, 473 N.W.2d 375, 377 (Minn. Ct. App. 1991).

²⁶⁹ *Scott*, 473 N.W.2d at 377 (“[T]he purpose of the implied consent advisory is to inform the driver of the serious consequences of his or her refusal. The onerous civil consequence of license revocation is designed to induce the driver to submit to testing. . . . When compared to the 90-day minimum revocation for taking but failing the test, the civil consequences strongly compel the driver to take the test.”).

²⁷⁰ Respondent’s Brief, *supra* note 160, at 18.

²⁷¹ Minnesota Rules of Professional Conduct Rule 1.2(d) prohibits lawyers from “counsel[ing] a client to engage . . . in conduct that the lawyer knows is criminal . . . but a lawyer may discuss the legal consequences of any proposed course of conduct with a client” MINN. RULES OF PROF’L CONDUCT r. 1.2(d) (1985).

²⁷² *Friedman v. Comm’r of Pub. Safety*, 473 N.W.2d 828, 833 (Minn. 1991).

²⁷³ *Id.*

²⁷⁴ *Id.*

her best interest to submit to the chemical test.²⁷⁵ However, by the time she obtained that information from counsel, the officers had already charged her with refusal.²⁷⁶ If the purpose of the implied-consent advisory actually is to encourage compliance and decrease refusal rates, it would be advantageous to allow drivers to speak with an attorney who can explain just how significant the consequences of refusal are.²⁷⁷

V. CONCLUSION

The existence of the search warrant and the insufficient advisory were incapable of protecting Rosenbush's rights. However, the presence of counsel would have ensured that Rosenbush obtained the full information concerning her rights, obligations, and procedures. As the court previously and correctly acknowledged, "[a]n attorney, not a police officer, is the appropriate source of legal advice. An attorney functions as an objective advisor who could explain the alternative choices" and the legal ramifications.²⁷⁸ Although the United States Supreme Court has recognized that the "foundation of the Sixth Amendment right to counsel is based on the traditional role of an attorney as a legal expert and strategist,"²⁷⁹ the Minnesota Supreme Court essentially replaces the role of counsel in the limited right to counsel context with the combination of a search warrant and the reading of an advisory that can be stated in a mere six words.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *See, e.g.,* Nyflot v. Comm'r of Pub. Safety, 369 N.W.2d 512, 514 (Minn. 1985) (showing the attorney advised suspected driver to submit to the chemical test, but the police officer refused to let her submit because her decision to refuse was final).

²⁷⁸ *Friedman*, 473 N.W.2d at 833.

²⁷⁹ *United States v. Henry*, 447 U.S. 264, 293 (1980) (Rehnquist, J., dissenting).

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